SUPREME COURT, U.S.
FILED
05 260 AUG 25 2005
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SHAUN P. MARTIN
PROFESSOR OF LAW
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
5998 Alcala Park
San Diego, CA 92110
(619) 260-2347

PETER K. STRIS
Counsel of Record
WILLIAM A. DELGADO
WILLENKEN WILSON LOH & STRIS LLP
725 S. Figueroa St., Ste. 1690
Los Angeles, CA 90017
(213) 955-9240

JOHN C. STEIN
THE BOCCARDO LAW FIRM LLP
111 West St. John St., Ste. 1100
San Jose, CA 95113
(408) 298-5678

Counsel for Petitioners

196226

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

As the Court of Appeals recognized below, this case squarely presents a question that is the subject of a four-to-two circuit conflict and that was addressed but left open by this Court in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). As the federal government has noted, the question is of extreme national importance and likely affects over $1 billion annually.

The Question Presented is:

Can a plan fiduciary bring a civil action against a plan participant to obtain "appropriate equitable relief" under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(3), where a term of the plan requires the participant to reimburse medical expenses advanced by the plan if the participant recovers money from a third-party tortfeasor and possesses such payments in an identifiable fund?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
TABLE OF APPENDICES	viii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	10
I. The Courts of Appeals Are Intractably Divided Over the Question Presented.	11
II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented.	14
III. The Decision Below Is In Conflict with This Court's Precedents.	17
IV. This Case Is an Ideal Vehicle to Resolve the Question Presented.	20
CONCLUSION	21

TABLE OF CITED AUTHORITIES

Page

Cases:

Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard, 393 F.3d 119 (CA10 2004) 12

Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco, 338 F.3d 680 (CA7 2003) 12, 13

Asbestos Workers Local No. 42 Welfare Fund v. Brewster, 227 F. Supp. 2d 226 (D. Del. 2002) ... 16

Bauer v. Gylten, 2002 U.S. Dist. LEXIS 7246 (D. N.D. 2002) ... 16

BlueCross BlueShield of South Carolina v. Carillo, 372 F. Supp. 2d 628 (N.D. Ga. 2005) 16

Bombardier Aero. Emple. Welfare Benefits Plan v. Ferrer Poirot & Wansbrough, 354 F.3d 348 (CA5 2003) 12, 13

B.P. Amoco Corp. v. Connell, 320 F. Supp. 2d 1368 (M.D. Ga. 2004) 16

Carpenters Health and Welfare Trust for Southern California v. Vonderharr, 384 F.3d 667 (CA9 2004) 13, 14

Donovan v. Cunningham, 716 F.2d 1455 (CA5 1983) 14-15

Cited Authorities

Page

Givens v. Wal-Mart Stores, Inc., et al.,
327 F. Supp. 2d 1057 (D. Neb. 2003) 16

Great-West Life & Annuity Ins. Co. v. Brown,
192 F. Supp. 2d 1376 (M.D. Ga. 2002) 16

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002) ..... *passim*

Hotel & Restaurant & Bar Emple. Fringe Benefit Funds v. Trong, 2002 U.S. Dist LEXIS 1697
(D. Minn. 2002) 16

Mank v. Green,
323 F. Supp. 2d 115 (D. Me. 2004) 16

Massachusetts Mutual Life Ins. Co. v. Russell,
473 U.S. 134 (1985) 4

Mertens v. Hewitt Associates,
508 U.S. 248 (1993) 4, 5, 6, 19

Metropolitan Life Ins. Co. v. Massachusetts,
471 U.S. 724 (1985) 2

Mid Atlantic Med. Svcs., LLC v. Sereboff,
407 F.3d 212 (CA4 2005) 1, 12

Patterson v. Shumate,
504 U.S. 753 (1992) 16

Cited Authorities

Page

Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987) 4

Primax Recoveries, Inc. v. Carey,
247 F. Supp. 2d 337 (S.D.N.Y. 2002) 16

Primax Recoveries, Inc. v. Lee,
260 F. Supp. 2d 43 (D.D.C. 2003) 16

Qualchoice, Inc. v. Rowland,
367 F.3d 638 (CA6 2004) 12, 13, 17, 18

Secretary of Labor v. Fitzsimmons,
805 F.2d 682 (CA7 1986) 15

Wellmark, Inc. v. Deguara,
257 F. Supp. 2d 1209 (D. Iowa 2003) 16

Westaff (USA), Inc. v. Arce,
298 F.3d 1164 (CA9 2002) 9, 12

Statutes:

11 N.C.A.C. § 12.0319 4

29 U.S.C. § 1002 2

29 U.S.C. § 1132 ..... *passim*

36 Okla. St. § 6092 4

Cited Authorities

	Page
75 Pa. C.S. § 1720	4
Cal Civ. Code § 3333.1(b)	3
Conn. Gen. Stat. § 52-225c	4
Ga. Code Ann. § 33-24-56.1	4
K.A.R. § 40-1-20	4
La. R.S. § 22:663	3
Minn. Stat. § 62A.095	4
N.J. Stat. Ann. § 2A:15-97	4
Ohio Rev. Code. Ann. § 2744.05(B)	4
Va. Code § 38:2-3405	4

Other Authorities:

Roger M. Baron, *Public Policy Consdierations Warranting the Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer Law Review 595 (2004) 7, 8, 12

Cited Authorities

Page

Brief filed on behalf of the American Association of Health Plans, the Blue Cross Blue Shield Association, the Chamber of Commerce of the United States, and the Health Insurance Association of America in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (No. 99-1786) 3

Brief of the Secretary of Labor as *Amicus Curiae* in Support of Qualchoice's Petition for *En Banc* Rehearing in *Qualchoice, Inc. v. Rowlan*, 367 F.3d 638 (CA6 2004) 2, 12, 14, 15

Brief for the United States as *Amicus Curiae* in Cement Masons Health and Welfare Trust Fund for Northern California et al. v. Stone (http://www.usdoj.gov/osg/briefs/2000/2pet/6invit/1999-1403.pet.ami.inv.html) 5, 6, 14

David Leishman, *Note, Adding Insult to Injury: ERISA, Knudson, and the Error of the Possession Theory*, 89 Minn. L. Rev. 1214 (2005) 3

Lorraine Schmall & Brenda Stephens, *ERISA Preemption: A Move Towards Defederalizing Claims for Patients' Rights*, 42 Brandeis L.J. 529 (2004) 2

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Decided May 4, 2005 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The District Of Maryland Filed May 10, 2004 ..... 20a

Appendix C — Opinion And Declaratory Judgment And Order Of The United States District Court For The District Of Maryland Decided January 26, 2004 ..... 24a

Appendix D — Order Of The United States Court Of Appeals For The Fourth Circuit Denying Petition For Rehearing And Suggestion For Rehearing *En Banc* Filed June 1, 2005 ..... 46a

Petitioners Joel and Marlene Sereboff respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit (Pet. App. 1a-19a) is published at 407 F.3d 212. The order of the district court granting summary judgment in favor of respondents (Pet. App. 24a-45a) is published at 303 F. Supp. 2d 691. The order of the district court granting attorneys' fees (Pet. App. 20a-23a) is published at 316 F. Supp. 2d 265.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Fourth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 46a-47a) on June 1, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 502 of the Employee Retirement Income Security Act of 1974, (hereinafter, "ERISA"), 29 U.S.C. § 1132, as amended, provides in relevant part:

> (a) Persons empowered to bring a civil action.
>
> A civil action may be brought—
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to

redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; . . . .

* * * *

STATEMENT OF THE CASE

1. ERISA is a federal statute that regulates employee pension and welfare plans. "An employee welfare-benefit plan or welfare plan is defined as one which provides to employees 'medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability [or] death,' whether these benefits are provided 'through the purchase of insurance or otherwise.'"[1] As of 2002, 137 million workers, retirees, and their families (*i.e.*, participants) were covered by one of the 2.5 million private sector employer-sponsored welfare plans governed by ERISA.[2] In fact, almost all health insurance in the United States—except for Medicare—is provided through employer-sponsored plans and is thus subject to ERISA.[3]

When a participant in an ERISA welfare plan is injured (*e.g.*, in an automobile accident), she will receive money from the plan (or its insurer) to pay for her medical expenses. The participant also may bring a personal injury lawsuit for money damages (including the recovery of medical expenses) against any third party who might have been responsible for her

[1] *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985) (quoting Section 3(1) of ERISA, 29 U.S.C. § 1002(1)).

[2] *See* Brief of the Secretary of Labor as *Amicus Curiae* in Support of Qualchoice's Petition for *En Banc* Rehearing in *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (CA6 2004) (hereinafter, "Brief of the Secretary of Labor").

[3] *See* Lorraine Schmall & Brenda Stephens, *ERISA Preemption: A Move Towards Defederalizing Claims for Patients' Rights*, 42 Brandeis L.J. 529, 538 (2004).

injuries. For this reason, plan managers (*i.e.*, fiduciaries) commonly require that every plan participant contractually agree to reimburse medical expenses out of any personal injury settlement or judgment that she might recover.[4] According to available data, "[m]illions and potentially billions of dollars are recouped annually by health plans and insurers by virtue of subrogation and other recovery mechanisms."[5]

For years, there has been an intense judicial struggle over whether or not ERISA permits a plan fiduciary to commence litigation in federal court to enforce these contractual reimbursement clauses. The answer to this jurisdictional question is exceedingly important because some

> states have flatly rejected, either by court decision or statute, the extension of subrogation actions into the realm of personal injury claims [and t]he majority of states . . . agree that an insurer is not entitled to share in a policyholder's recovery from a tortfeasor until the policyholder has been fully compensated for her loss.[6]

---

[4] The right created by such a contractual provision is often referred to as a "subrogation" right to reimbursement.

[5] Brief filed on behalf of the American Associations of Health Plans, the Blue Cross Blue Shield Association, the Chamber of Commerce of the United States, and the Health Insurance Association of America at p. 10 in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (No. 99-1786).

[6] David Leishman, *Note, Adding Insult to Injury: ERISA, Knudson, and the Error of the Possession Theory*, 89 Minn. L. Rev. 1214, 1216-17 (2005). *See also* Cal. Civ. Code § 3333.1(b); La. R.S. § 22:663;

(Cont'd)

2. Whether or not a plan fiduciary may commence litigation in federal court to enforce a contractual reimbursement clause turns entirely on the interpretation of Section 502(a)(3) of ERISA.[7] Among other things, this section authorizes a plan fiduciary to seek "appropriate equitable relief" to enforce the terms of its plan. Because of the importance of the issue, this Court has twice granted certiorari to interpret the scope of the phrase "appropriate equitable relief" in Section 502(a)(3).

In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), (hereinafter, "*Mertens*") this Court held that the text of Section 502(a)(3) leaves no doubt that Congress intended "appropriate equitable relief" to include only those types of relief that were typically available in equity. *See Mertens*, 508 U.S. 248. Pursuant to the holding of *Mertens*, for

---

(Cont'd)
Ga. Code Ann. § 33-24-56.1; N.J. Stat. Ann. § 2A:15-97; Va. Code § 38:2-3405; 11 N.C.A.C. § 12.0319; 75 Pa. C. S. § 1720; Minn. Stat. § 62A.095; K.A.R. § 40-1-20; Conn. Gen. Stat. § 52-225c; Ohio Rev. Code Ann. § 2744.05(B); 36 Okl. St. § 6092.

[7] Section 502(a) contains the six civil enforcement provisions of ERISA. This Court has repeatedly held that Section 502(a) provides the exclusive remedies to a civil litigant under the statute. *See e.g., Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("The six carefully integrated civil enforcement provisions found in section 502(a) of the statute as finally enacted provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.").

example, plan fiduciaries could not file garden-variety breach of contract actions in federal court seeking money damages.

After *Mertens*, ERISA plan fiduciaries began to artfully plead such breach of contract claims in an attempt to shoehorn them into *Mertens'* definition of "appropriate equitable relief." In particular, plan fiduciaries tried to enforce their reimbursement clauses by seeking (i) declarations or injunctions stating that a participant must honor such provisions or (ii) the imposition of a constructive trust or equitable lien on any monies received by a plan participant from a third party tortfeasor. Plan fiduciaries argued that they were not seeking money damages for breach of their reimbursement clauses, which would be prohibited by *Mertens*, but rather "appropriate equitable relief" under the statute. Participants, however, countered that such artful pleading was nothing more than an end-run around the holding of *Mertens*.

By 2002, there was a square circuit conflict over whether such lawsuits were permissible under Section 503(a)(3) of ERISA. Recognizing the importance of the issue, this Court granted certiorari in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (hereinafter, "*Knudson*").[8]

---

[8] Around the same time, petitions for certiorari were also filed in two other cases that presented the same question as Knudson: *Cement Masons Health and Welfare Trust Fund for Northern California et al. v. Stone*, (No. 99-1403) and *Reynolds Metals Co. v. Ellis*, (No. 99-1787). In response to this Court's order inviting the Solicitor General to express the views of the United States, the federal government filed an *amicus* brief in Cement Masons asking this Court to grant certiorari (and recommending the *Ellis* case as the best vehicle) because "the question presented by this case is of substantial importance to the proper enforcement of ERISA." Brief for the

(Cont'd)

The *Knudson* Court began its decision by reiterating the principle that "'equitable relief' in § 502(a)(3) must refer to 'those categories of relief that were *typically* available in equity. . . .'" *Knudson*, 534 U.S at 210 (*citing Mertens*, 508 U.S. at 256). The Court then applied this core principle to each form of relief sought by the plan fiduciary (*e.g.*, an injunction preventing a refusal to reimburse the plan). Despite the plan's attempt to dress the relief it sought in "equitable" language, the Court concluded that what the plan sought was "in essence, to impose personal liability on respondents for a contractual obligation to pay money–relief that was not typically available in equity." *Id.*

The facts of *Knudson*, however, were somewhat unique, and slightly different than, the typical case in which plan fiduciaries seek to enforce reimbursement clauses. In *Knudson*, the plan participant (Janette Knudson) had been rendered a paraplegic. As such, the monies received from the tortfeasor who had caused her accident were in the hands of her attorney and a Special Needs Trust. The plan fiduciary, however, had sued Janette Knudson directly and not her attorney or the trustee.

For this reason, the *Knudson* Court was not required to resolve the question presented in typical ERISA subrogation cases: whether a plan's lawsuit can properly be construed as one for "appropriate equitable relief" under Section 502(a)(3) if the plan sues a participant who is actually in possession of

---

(Cont'd)

United States as *Amicus Curiae* in *Cement Masons Health and Welfare Trust Fund for Northern California et al. v. Stone*, (*http://www.usdoj.gov/osg/briefs/2000/2pet/6invit/1999-1403.pet.ami.inv.html*) (last accessed on 8/15/05) (hereinafter, "Brief of the Solicitor General").

the money in question. *See Knudson*, 534 U.S at 220 ("Nor do we decide whether petitioners could have obtained equitable relief against respondents' attorney and the trustee of the Special Needs Trust, since petitioners did not appeal the District Court's denial of their motion to amend their complaint to add these individuals as codefendants.").

This open question provided a glimmer of hope for plan fiduciaries—particularly in light of the Court's recognition, in dicta, that "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213. In the words of one commentator,

> the stage was set for future litigation. Was the [*Knudson*] Court's denial of a federal remedy for reimbursement under § 502(a)(3)(A) of ERISA a complete foreclosure of the reimbursement effort by ERISA plans? Or could the matter of reimbursement be successfully pursued by an ERISA plan if it were to arise in a different posture?[9]

Relying upon this open question, plan fiduciaries have continued aggressively to pursue their claims for reimbursement against those participants who have obtained personal injury settlements or judgments. These fiduciaries have sought to distinguish *Knudson* by filing their actions against the typical participant who (unlike Janette Knudson)

---

[9] Roger M. Baron, *Public Policy Considerations Warranting the Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer Law Review 595, 600-01 (2004).

has personally received money from a settlement or judgment and who possesses that recovery in an identifiable fund.

This post-*Knudson* litigation has led to another substantial circuit split. Four courts of appeal—including the Fourth Circuit in this case—have held (in published opinions) that an "'exception' to the *Knudson* result occurs when the funds are in the possession and control of a named defendant. This has been termed the 'possession theory' exception to *Knudson*."[10] By contrast, two courts of appeal (in published opinions) have flatly rejected this "exception" to *Knudson*, holding that a claim for money damages, no matter how artfully pleaded, is still not an "equitable" claim.

As the Panel below explicitly noted, the circuit split is squarely presented in this case. Pet. App. 3a. As the district court noted, "the parties [] entered into a comprehensive stipulation of undisputed facts." Pet. App. 27a. These facts—which were attached (Pet. App. 36a-45a) without exhibits to the district court's first order—are as follows:

4. Petitioners Joel and Marlene Sereboff (hereinafter, the "Sereboffs") participated in a self-funded ERISA welfare plan (hereinafter, the "Plan") administered by fiduciary Mid Atlantic Medical Services, Inc. (hereinafter, "Mid Atlantic"). Pet. App. 36a-37a. On June 22, 2000, the Sereboffs were injured in an automobile accident in California. Pet. App. 36a. In connection with the injuries suffered by the Sereboffs in this accident, they received from the Plan a total of $74,869.37 in medical benefits for their accident related injuries. Pet. App. 37a.

---

[10] Baron, *supra* note 6 at 611-12.

On August 11, 2000, the Sereboffs filed a personal injury lawsuit in California against various third-parties. Pet. App. 39a. In January of 2003, the Sereboffs settled their California personal injury lawsuit with all parties for $750,000. Pet. App. 44a. The settlement funds were deposited into an investment account controlled by the Sereboffs. Pet. App. 6a. In March of 2003, Mid Atlantic demanded reimbursement from the Sereboffs from their settlement proceeds for the amount paid to them as medical benefits, in accordance with a contractual provision included in the Plan. *See* Pet. App. 38a-39a, 45a. Relying on the post-*Knudson* case of *Westaff (USA), Inc. v. Arce*, 298 F.3d 1164 (CA9 2002) (hereinafter, "*Westaff*"), which prohibits plan fiduciaries from pursuing such claims in the Ninth Circuit, the Sereboffs retained the $74,869.37. Pet. App. 45a.

Likely aware that the *Westaff* decision prohibited it from obtaining reimbursement from the Sereboffs in the Ninth Circuit (*i.e.*, California), Mid Atlantic filed suit *in Maryland* under section 502(a)(3) of ERISA for equitable reimbursement from the settlement proceeds for the medical benefits previously provided to the Sereboffs. On January 26, 2004, a federal district court in Maryland granted Mid Atlantic's motion for summary judgment and ordered the Sereboffs to transfer $74,869.37 plus interest from the partitioned funds held within their investment account to Mid Atlantic (hereinafter, the "Reimbursement Award"). Pet. App. 24a-45a.[11]

---

[11] The court reduced this amount by Mid Atlantic's pro rata share of reasonable attorney fees and court costs (hereinafter, the "Deduction Ruling"). Pet. App. 32a. On May 10, 2004, the district court also granted Mid Atlantic's motion for attorneys' fees (hereinafter, the "Attorneys' Fees Ruling"). Pet. App. 20a-22a.

5. On April 6, 2004, the Sereboffs filed a timely appeal to the Fourth Circuit arguing that the relief granted by the district court violated this Court's holding in *Knudson*. The Court of Appeals, however, affirmed the Reimbursement Award.[12] In its opinion, the Fourth Circuit expressly noted the existence of a circuit split on the question presented by the Reimbursement Award (a question that was not addressed by *Knudson*'s holding): "whether a plan fiduciary asserting a subrogation right to reimbursement from a plan beneficiary who has received payments from a third party, and who possesses that recovery in an identifiable fund, is seeking 'equitable relief' under § 502(a)(3) of ERISA." Pet. App.3a

Petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc* which was denied on June 1, 2005. Pet. App. 46a-47a.

This petition followed.

REASONS FOR GRANTING THE PETITION

This case satisfies all of the criteria for Supreme Court review. The Panel below openly acknowledged that there is a deep split among the circuits regarding the Question Presented. *See* Pet App. 3a ("The primary issue on appeal involves application of the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002), and it is one on which our sister circuits are split.").

As the federal government has repeatedly noted, the Question Presented—on which the circuits are split—is of

---

[12] The Fourth Circuit Panel also affirmed the Deduction Ruling but reversed the Attorney's Fees Ruling. Pet. App. 1a-19a.

exceptional importance. Among other reasons, the Question Presented is of manifest importance because it is outcome determinative as to whether or not plan fiduciaries can bring suit in federal court under ERISA to recover what is likely more than $1 billion annually.

The frequent recurrence of this issue and its importance to plan fiduciaries and participants throughout the nation makes the conflict among the circuits untenable. This is particularly true because (as this Court has long recognized) the maintenance of national uniformity is an essential policy underlying ERISA. This case squarely presents the conflict and exemplifies the additional problem of federal forum shopping engendered by this particular circuit split.

Finally, the decision below conflicts with this Court's precedents. Although the Question Presented in this Petition was left open in *Knudson*, this Court's holding in that case set forth a clear rule that was misapplied by the Fourth Circuit here. Briefly put, the remedies sought by respondent in this case cannot constitute "appropriate equitable relief" under Section 502(a)(3) of ERISA because they would not have been traditionally available in a court of equity.

Certiorari therefore should be granted.

I. The Courts of Appeals Are Intractably Divided Over the Question Presented.

The Question Presented is the subject of a four-to-two circuit conflict openly acknowledged by the court of appeals. *See* Pet App. 3a ("The primary issue on appeal involves application of the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 151 L. Ed.

2d 635, 122 S. Ct. 708 (2002), and it is one on which our sister circuits are split."). This circuit conflict has repeatedly been recognized by commentators, *e.g.* Baron, *supra* note 6, as well as by the federal government, *e.g.*, Secretary of Labor Brief, *supra* note 2.

1. The Fourth, Fifth, Seventh, and Tenth Circuits have all adopted what has been termed the "possession theory" exception to *Knudson*.[13] These courts of appeal have squarely held that that a plan fiduciary is seeking "appropriate equitable relief" under Section 502(a)(3) of ERISA when the fiduciary asserts a right to reimbursement from a plan participant to recover funds that are (i) specifically identifiable, (ii) belong in good conscience to the fiduciary, and (iii) are within the beneficiary's possession. *Mid Atlantic Med. Svcs., LLC*[14] *v. Sereboff*, 407 F.3d 212 (CA4 2005); *Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F.3d 1119 (CA10 2004); *Bombardier Aero. Emple. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348 (CA5 2003); *Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco*, 338 F.3d 680 (CA7 2003).

On the other hand, the Sixth and Ninth Circuits have flatly rejected the "possession theory" exception to *Knudson*. *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (CA6 2004); *Westaff (USA), Inc. v. Arce*, 298 F.3d 1164 (CA9 2002). These courts of

---

[13] "This exception has been termed as the 'possession theory' exception to *Knudson*. Under this theory, *Knudson* would prohibit actions by ERISA plans to seek reimbursement only 'if the insured is not in the possession of clearly identifiable proceeds.'" *Baron, supra* note 6 at 612.

[14] The caption of this opinion appears to mistakenly list Mid Atlantic as a limited liability company (*i.e.*, LLC). Pet. App. 1a. The body of the opinion, however, correctly refers to Mid Atlantic as a corporation (*i.e.*, Inc.). Pet. App. 2a.

appeals have squarely held "that a plan fiduciary's assertion of a subrogation right to reimbursement from a plan beneficiary who has received payments from a third party is legal in nature, *regardless of whether the beneficiary possesses that recovery in an identifiable fund.*" Pet. App. 13a-14a (emphasis added).

2. The circuit conflict will not resolve itself without this Court's intervention. The Sereboffs' case is illustrative. Although the Fourth Circuit explicitly acknowledged the circuit split and the contrary view of the Sixth and Ninth Circuits, the court of appeals nevertheless refused to reconsider its position and denied the Sereboffs' petition for rehearing and suggestion for rehearing *en banc*. Pet. App. 46a-47a.

The respective views of the other courts of appeals are similarly entrenched as evidenced by their denials of petitions for rehearing and suggestion for rehearing *en banc*. *E.g.*, *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (CA6 2004) *reh'g and sugg. for reh'g en banc denied* (Sept. 10, 2004); *Bombardier Aero. Emple. Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348 (CA5 2003), *reh'g and sugg. for reh'g en banc denied* (Jan. 13, 2004); *Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco*, 338 F.3d 680 (CA7 2003), *reh'g and sugg. for reh'g en banc denied* (Aug. 22, 2003).

The Ninth Circuit has gone so far as to recently reaffirm its rejection of the "possession theory" exception to *Knudson*. *Carpenters Health and Welfare Trust for Southern California v. Vonderharr*, 384 F.3d 667 (CA9 2004) ("[*Knudson*] buttressed rather than overruled our holdings.") (hereinafter, "*Vonderharr*"). On January 31, 2005, a petition for certiorari

was filed in *Vonderharr*.[15] On April 18, 2005, this Court invited the Solicitor General to express the views of the United States on the questions presented in *Vonderharr*—one of which is the precise Question Presented by this Petition. On April 22, 2005, this Court received a Notice that the parties in *Vonderharr* had entered into a settlement agreement. *See id.* This settlement renders the *Vonderharr* case moot.

The circuits' firm commitments to their conflicting views underscore the need for this Court's intervention and the creation of a uniform rule.

II. The Circuit Conflict Is Untenable Given the Importance of the Question Presented.

As the federal government has repeatedly noted, the Question Presented is of exceptional importance. *See e.g.*, Brief of the Secretary of Labor, *supra* note 2 (noting that "[i]n addition to being in conflict with the decisions of other circuits . . . the [Question Presented] is of exceptional importance"); Brief of the Solicitor General, *supra* note 8 ("The question presented by this case is of substantial importance to the proper enforcement of ERISA because it affects the ability of plan fiduciaries to recoup significant amounts of money on behalf of employee benefit trust funds.")[16]

---

[15] *See* United States Supreme Court Docket in *Carpenters Health and Welfare Trust for Southern California v. Vonderharr* (02-57183, 03-55296, 03-55312) found at *http://www.supremecourtus.gov/docket/04-1049.htm* (last accessed on 8/17/05).

[16] As the primary authority for the interpretation and enforcement of the provisions of Title I of ERISA, *Donovan v.*

(Cont'd)

The Question Presented is outcome determinative as to whether or not plan fiduciaries can bring suit in federal court under ERISA to recover what is likely more than $1 billion annually. According to the federal government,

> an estimated 137 million people [as of 2002] participated in private sector employer-sponsored health care plans covered by ERISA. Many of these plans contain reimbursement/subrogation provisions. Indeed, in 2000, the largest provider of subrogation services in the United States reported subrogation recoveries that averaged $4.8 million for every one million persons covered by its clients.

Brief of the Secretary of Labor, *supra* note 6 (*citing* Healthcare Recoveries, Inc., SEC Form 10K (Mar. 27, 2001)).[17]

(Cont'd)

Cunningham, 716 F.2d 1455, 1462-63 (CA5 1983), the interests of the Secretary of Labor include promoting uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets. *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (CA7 1986) (*en banc*). The Secretary is interested in the outcome of the Question Presented because he believes that "[t]he plans' ability to seek reimbursement of benefits from plan participants who have recovered funds from third parties is important to plans' continued financial stability." Brief of Secretary of Labor, *supra* note 2. To be clear: although Petitioners agree with the United States that the Question Presented is of exceptional importance, Petitioners disagree with the government regarding the proper answer to the Question Presented (i.e., on the merits).

[17] Healthcare Recoveries is just one—albeit the largest—provider of subrogation services in the United States. It recovered $237.3 million in health claims and had a backlog of over $1.1 billion of potentially recoverable claims during fiscal year 2000 alone. *See id.*

In light of the stakes involved, it is not surprising that six different circuits have been forced to squarely confront the Question Presented in recent years. It is also not surprising that federal district courts in every single circuit have confronted the Question Presented in published opinions.[18]

The frequent recurrence of this issue and its importance to plan fiduciaries and beneficiaries throughout the nation makes the conflict among the circuits untenable. This is particularly true given the fact that an essential policy underlying ERISA is the maintenance of national uniformity where benefits are concerned. *See Patterson v. Shumate*, 504 U.S. 753, 765 (1992) ("[O]ur holding furthers another important policy underlying ERISA: uniform national treatment of pension benefits."). Under the current legal regime, the scope of a plan fiduciary's reimbursement rights (and, conversely, a plan participant's reimbursement obligations) varies with the location in which the plan participant may be subject to personal jurisdiction. As long

---

[18] In the First Circuit, *see e.g, Mank v. Green*, 323 F. Supp. 2d 115 (D. Me. 2004). In the Second Circuit, *see e.g., Primax Recoveries, Inc. v. Carey*, 247 F. Supp. 2d 337 (S.D.N.Y. 2002). In the Third Circuit, *see e.g., Asbestos Workers Local No. 42 Welfare Fund v. Brewster*, 227 F. Supp. 2d 226 (D. Del. 2002). In the Eighth Circuit, *see e.g., Givens v. Wal-Mart Stores, Inc., et al.*, 327 F. Supp. 2d 1057 (D. Neb. 2003); *Wellmark, Inc. v. Deguara*, 257 F. Supp. 2d 1209 (D. Iowa 2003); *Bauer v. Gylten*, 2002 U.S. Dist. LEXIS 7246 (D.N.D. 2002); *Hotel & Restaurant & Bar Employees Fringe Benefit Funds v. Trong*, 2002 U.S. Dist. LEXIS 1697 (D. Minn. 2002). In the Eleventh Circuit, *see e.g., BlueCross BlueShield of South Carolina v. Carillo*, 372 F. Supp. 2d 628 (N.D. Ga. 2005); *B.P. Amoco Corp. v. Connell*, 320 F. Supp. 2d 1368 (M.D. Ga. 2004); *Great-West Life & Annuity Ins. Co. v. Brown*, 192 F. Supp. 2d 1376, 1380-81 (M.D. Ga. 2002). In the D.C. Circuit, *see e.g., Primax Recoveries, Inc. v. Lee*, 260 F. Supp. 2d 43 (D.D.C. 2003).

as the circuits disagree, for example, plan fiduciaries may sue in federal court under Section 502(a)(3) to enforce their contractual reimbursement clauses against plan participants who are subject to personal jurisdiction in Maryland (within the Fourth Circuit) but not against plan participants who are only subject to personal jurisdiction in California (within the Ninth Circuit).

Finally, the current circuit conflict encourages plan fiduciaries to engage in nationwide forum shopping because plan participants may be subject to personal jurisdiction in multiple circuits with competing rules. This case is a perfect illustration. Although the Sereboffs were injured (and collected money from a third-party tortfeasor) in California, Mid Atlantic chose to sue the Sereboffs in Maryland federal court to avoid the unfavorable law of the Ninth Circuit.

The intervention of this Court is needed in order to resolve this conflict over an issue of manifest national importance.

III. The Decision Below Is In Conflict with This Court's Precedents.

Each of the courts of appeals and district courts to squarely confront the Question Presented has based its decision on the principles announced by this Court in *Knudson*.[19] Although the Question Presented in this Petition was left open by *Knudson*, the analytical approach mandated by the holding of *Knudson* was misapplied by the Fourth

---

[19] *See* Pet. App. 3a ("The primary issue on appeal involves application of the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson* . . ."); *see also Qualchoice*, 367 F.3d at 648 ("We therefore must determine ourselves how to answer that question, left open by *Knudson*.").

Circuit in this case as it has been misapplied by the other three courts of appeals that have adopted the "possession theory" exception.

Knudson teaches that to determine whether a claim by a plan fiduciary is, in fact, one for "appropriate equitable relief" under Section 502(a)(3) of ERISA, a court must determine whether or not the relief sought by the plan fiduciary would have traditionally been awarded by a court of equity. By properly applying this standard, the Sixth and Ninth Circuits have correctly rejected the "possession theory" exception to *Knudson*. *E.g.*, *Qualchoice*, 367 F.3d at 649

> We concluded, however, that the source of the claim asserted by [the plan fiduciary] is a contract to pay money and that the procedural mechanisms of constructive trust and equitable lien are not proper mechanisms for enforcing this right, *as such relief would not have traditionally been awarded by a court of equity in a breach of contract action.*

(Emphasis added).

On the other hand, the Fourth Circuit panel below—as well as the other three courts of appeal to have adopted the "possession theory" exception—failed to engage in a meaningful analysis regarding whether the relief sought by the plan fiduciary would have traditionally been awarded by a court of equity, as required by *Knudson*. Instead, these courts have based their holdings upon dicta in *Knudson* stating that "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Knudson*, 534 U.S. at 213.

While this statement of dicta in *Knudson* is uncontroversial, it has been misapplied to the facts of the Question Presented by the group of circuits who apply the "possession theory" exception. The rule of these circuits misinterprets the concept of traceability *at equity*, which allowed litigants to recover monies or property belonging to them in good conscience, though it had changed forms (*e.g.*, from money to real property), provided it could be traced back *to the plaintiff* as the original source of the precise monies or property at issue.

When the facts of the Question Presented are involved, the monies at issue can be traced from their current location (*e.g.*, a particular bank account) back to the third-party tortfeasor—who paid the participant pursuant to the settlement or judgment of a personal injury lawsuit. These monies cannot, however, be traced from the tortfeasor back to the plan fiduciary. The tortfeasor may have paid the plan participant to compensate her (all or in part) for medical expenses. Those medical expenses, it is true, were already paid for with monies advanced by the plan. The funds paid by the tortfeasor, however, are different from those advanced by the plan because the latter has already been depleted to pay for the participant's legitimate medical care.

This crucial distinction, while a technical one, is dispositive in light of this Court's decisions in *Mertens* and *Knudson*. As far as traditional courts of equity were concerned, the funds are not "traceable" to the plan. The claims at issue are therefore legal. In the words of this Court in *Knudson*:

> Here, petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available

> in equity. "A claim for money due and owing under a contract is 'quintessentially an action at law.'" "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." And 'money damages are, of course, the classic form of *legal* relief.

Knudson, 534 U.S at 210 (internal citations omitted).

In sum, the relief sought by plan fiduciaries cannot constitute "appropriate equitable relief" under Section 502(a)(3) and the decision below is, thus, in conflict with this Court's precedents.

IV. This Case Is An Ideal Vehicle to Address the Question Presented.

This case presents a textbook vehicle to resolve the circuit conflict. The relevant facts are uncontested because the parties stipulated to all facts. Pet. App. 6a, 36a-45a. The Question Presented is determinative of the parties' claims. Pet. App. 3a. Moreover, the circuit conflict is squarely presented. The claims involved are indistinguishable (and the facts are remarkably similar) to those in the cases decided by the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits. Put simply, the case arises in a context and in a procedural posture that could hardly be better suited to this Court's resolution of the exceptionally important jurisdictional Question Presented.

Furthermore, the interests of ERISA weigh heavily in favor of granting certiorari at this time. The circuit conflict over the Question Presented undermines a fundamental policy underlying the statute—national uniformity in the area of employee benefits. Despite this Court's grant of certiorari in *Knudson*, the circuit conflict over the Question Presented persists. This important and frequently recurring question merits review in this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SHAUN P. MARTIN
PROFESSOR OF LAW
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
5998 Alcala Park
San Diego, CA 92110
(619) 260-2347

PETER K. STRIS
Counsel of Record
WILLIAM A. DELGADO
WILLENKEN WILSON LOH & STRIS
725 S. Figueroa St., Ste. 1690
Los Angeles, CA 90017
(213) 955-9240

JOHN C. STEIN
THE BOCCARDO LAW FIRM LLP
111 West St. John St., Ste. 1100
San Jose, CA 95113
(408) 298-5678

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MAY 4, 2005

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 04-1336, 04-1403, 04-1722

December 2, 2004, Argued
May 4, 2005, Decided

MID ATLANTIC MEDICAL SERVICES, LLC,

Plaintiff-Appellee,

v.

JOEL SEREBOFF; MARLENE SEREBOFF,

Defendants-Appellants.

SECRETARY OF LABOR, Amicus Supporting Appellee.

MID ATLANTIC MEDICAL SERVICES, LLC,

Plaintiff-Appellant,

v.

JOEL SEREBOFF; MARLENE SEREBOFF,

Defendants-Appellees.

Appendix A

MID ATLANTIC MEDICAL SERVICES, LLC,

Plaintiff-Appellee,

v.

JOEL SEREBOFF; MARLENE SEREBOFF,

Defendants-Appellants.

JUDGES: Before WIDENER and KING, Circuit Judges, and Henry F. FLOYD, United States District Judge for the District of South Carolina, sitting by designation. Judge King wrote the opinion, in which Judge Widener and Judge Floyd joined.

OPINION BY: KING, Circuit Judge:

These appeals emanate from a civil action initiated in the District of Maryland under § 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"). After Mid Atlantic Medical Services, Inc. ("MAMSI"), an ERISA plan fiduciary, had paid nearly $75,000 for accident-related benefits to Joel and Marlene Sereboff (the "Sereboffs"), the Sereboffs recovered $750,000 from the offending tortfeasors in a personal injury action in California state court (the "California litigation"). When the Sereboffs failed to reimburse MAMSI for the medical benefits it had paid, MAMSI sued, asserting that, as plan beneficiaries, they had failed to comply with their subrogation obligations to reimburse it for benefits paid on their behalf. By Order of January 27, 2004, the district court awarded summary judgment to MAMSI, deeming the relief sought to be equitable in nature under § 502(a)(3) and requiring the Sereboffs to

reimburse MAMSI for the payments it had made (the "Reimbursement Award"). The court then reduced the Reimbursement Award to account for MAMSI's share of the expenses incurred by the Sereboffs in pursuing the California litigation (the "Deduction Ruling"). Thereafter, by Order of May 10, 2004, the court awarded MAMSI the fees and costs it had incurred in securing the Reimbursement Award (the "Attorney's Fee Ruling").

The Sereboffs have appealed the Reimbursement Award and the Attorney's Fee Ruling, and MAMSI has cross-appealed on the Deduction Ruling. The primary issue on appeal involves application of the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), and it is one on which our sister circuits are split: whether a plan fiduciary asserting a subrogation right to reimbursement from a plan beneficiary who has received payments from a third party, and who possesses that recovery in an identifiable fund, is seeking "equitable relief" under § 502(a)(3) of ERISA. We agree with the district court that MAMSI's claim for reimbursement seeks equitable relief under § 502(a)(3) and, as explained below, we affirm the Reimbursement Award and the Deduction Ruling. We vacate and remand, however, on the Attorney's Fee Ruling.

I.

MAMSI serves as fiduciary of an ERISA-covered employee welfare benefit plan, the MAMSI Life and Health Insurance PPO Plan (the "Plan"). The Sereboffs, who live in Owings Mills, Maryland, were beneficiaries of the Plan, participating through Mrs. Sereboff's employer, the Katzen Eye Group. On June 22,

2000, the Sereboffs were injured in an automobile accident in California, and the Plan paid their medical expenses in the sum of $74,869.37.[1] The Plan contains an "Acts of Third Parties" subrogation provision, which accords MAMSI, as Plan fiduciary, the "right to recover any payments" made to beneficiaries by third parties for costs associated with an injury resulting from the acts of "another person or party." Plan at 29 ("Acts of Third Parties" provision). Under the Plan, any recovery by MAMSI from such payments is subject to a deduction for "reasonable attorney fees and court costs" incurred by the beneficiaries in securing the third-party payments, "prorated to reflect that portion of the total recovery" reimbursed to MAMSI for the benefits it had paid. *Id.*

On August 11, 2000, the Sereboffs initiated the California litigation in the Superior Court of Santa Clara County. In late 2000 and early 2001, MAMSI informed the Sereboffs and their lawyer, in multiple writings, that it had paid medical benefits on behalf of the Sereboffs and that, pursuant to the Plan, MAMSI was entitled to reimbursement for those expenditures should the California litigation be successful. MAMSI requested that the Sereboffs and their attorney execute subrogation lien agreements acknowledging the Sereboffs' obligations under the Plan. MAMSI also offered the attorney, Mr. Stein, the opportunity to represent it in connection with its subrogation claim, on a contingency fee basis. Neither the Sereboffs nor Stein executed the proposed agreements, and Stein did not initially respond to MAMSI's offer that he represent MAMSI in its subrogation claim.

---

1. In connection with the injuries suffered by Mrs. Sereboff, the Plan paid benefits of $73,778.26. In connection with Mr. Sereboff's injuries, the Plan paid benefits of $1,091.11.

Appendix A

On April 13, 2001, MAMSI made what it called a "formal demand" that the Sereboffs cooperate in connection with its subrogation efforts under the Plan. On April 24, 2001, Stein informed MAMSI that it was not entitled to reimbursement from the Sereboffs, because subrogation liens such as those being pursued by MAMSI are not recoverable under decisions of the Ninth Circuit.[2] On May 23, 2001, in responding to Stein, MAMSI reasserted its request that the subrogation lien agreements be executed. MAMSI contended that the Plan was a Maryland contract subject to the law of that State, and that California law was inapplicable.[3] On May 30, 2001, Stein advised MAMSI that it should retain California counsel to protect its subrogation rights in the California litigation, because he could not properly represent the interests of both the Sereboffs and MAMSI.

On January 23, 2003, the Sereboffs settled the California litigation for the sum of $750,000. Upon receipt of the settlement funds, however, they declined to recognize MAMSI's position on subrogation and reimburse it for the benefits it had paid on their behalf. Instead, Stein disbursed the funds to the Sereboffs

---

2. In his April 24, 2001 letter to MAMSI, Stein relied on *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246 (9th Cir.2000); *Cement Masons Health & Welfare Trust Fund v. Stone*, 197 F.3d 1003 (9th Cir.1999); and *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir.1997), to support the proposition that MAMSI was not entitled to reimbursement from his clients.

3. In contrast to the assertion in MAMSI's May 23, 2001 letter that Maryland law governs the issues here, the parties, by their Joint Stipulation of Facts, have agreed that this proceeding is governed by the legal principles applicable under ERISA.

and his law firm, pursuant to their representation agreement in the California litigation. The Sereboffs then placed the funds into their investment accounts.

On August 5, 2003, MAMSI instituted this proceeding in the District of Maryland, pursuant to § 502(a)(3) of ERISA, which authorizes a civil action by an ERISA participant or fiduciary to enjoin any act which violates the terms of an ERISA plan, or to "obtain other appropriate equitable relief" to enforce the plan's provisions. 29 U.S.C. § 1132(a)(3). MAMSI thereby sought, *inter alia,* restitution of the funds held by the Sereboffs in their investment accounts. It also sought emergency relief in the district court, seeking to enjoin the Sereboffs and Stein from disposing of the settlement funds until MAMSI's claims for reimbursement could be resolved. On August 11, 2003, the Sereboffs agreed, by stipulation filed with the court, to "preserve $74,869.37 of the settlement funds" until it ruled on the merits of the dispute.[4]

On September 16, 2003, MAMSI moved for summary judgment against the Sereboffs, asserting that it was "entitled to recover the disputed proceeds under the terms of the Plan," and maintaining that it was seeking "equitable relief" authorized under § 502(a)(3) of ERISA. On September 25, 2003, the Sereboffs sought dismissal of the district court action, asserting that MAMSI was "seeking monetary damages which [were] not permissible" under ERISA. On January 27, 2004, the district court denied the Sereboffs' motion to dismiss. It granted in part MAMSI's motion for summary judgment, agreeing that MAMSI sought relief under § 502(a)(3) and that it was entitled to reimbursement of the $74,869.37, plus interest (the Reimbursement Award).

4. The August 11, 2003 stipulation is separate and distinct from the Joint Stipulation of Facts.

The court then reduced the Reimbursement Award to account for MAMSI's "prorated" share of the "reasonable attorney fees and court costs" incurred by the Sereboffs in pursuing the California litigation (the Deduction Ruling).

On February 9, 2004, MAMSI sought an award requiring the Sereboffs to pay the expenses it had incurred in securing the Reimbursement Award. On May 10, 2004, the district court granted that request, and it entered judgment for MAMSI in the sum of $19,044.75, plus interest (the Attorney's Fee Ruling). As noted, the Sereboffs have appealed the Reimbursement Award and the Attorney's Fee Ruling, and MAMSI has cross-appealed on the Deduction Ruling. We possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We review de novo a district court's award of summary judgment, viewing the facts and inferences drawn therefrom in the light most favorable to the non-moving party. *Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418 (4th Cir.2004). In this proceeding, the Sereboffs' challenge to summary judgment on the Reimbursement Award and MAMSI's contention of error with regard to the Deduction Ruling present questions of law to be reviewed de novo. *See Johannssen v. Dist. No. 1—Pac. Coast Dist.*, 292 F.3d 159, 168 (4th Cir.2002). On the other hand, we review for abuse of discretion the Sereboffs' challenge to the Attorney's Fee Ruling. *See id.* at 178.

Appendix A

III.

Turning to the contentions of the parties, we first assess the primary issue raised here—the Sereboffs' challenge to the Reimbursement Award—which turns on whether MAMSI sought relief that is properly characterized as "other appropriate equitable relief" under § 502(a)(3) of ERISA. We then assess MAMSI's challenge to the Deduction Ruling and the Sereboffs' appeal of the Attorney's Fee Ruling.

A.

The Sereboffs first contend that the Reimbursement Award was erroneously made, asserting that the relief MAMSI sought was legal, rather than equitable, in nature. In determining whether the district court properly granted the Reimbursement Award, we first assess whether § 502(a)(3) authorizes MAMSI to seek restitution of the disputed funds held in the Sereboffs' investment accounts. Section 502(a)(3) is the civil enforcement mechanism available to ERISA fiduciaries seeking to recover benefits paid under an ERISA plan. 29 U.S.C. § 1132(a)(3). It authorizes the pursuit of a civil action by an ERISA fiduciary to enjoin any act which violates the terms of a plan, or to "obtain other appropriate *equitable* relief" to enforce a plan's provisions. Hyperlink *Id.* (emphasis added). In disputes where § 502(a)(3) does not expressly authorize relief, the federal courts are not empowered to award it. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (emphasizing Court's "unwillingness to infer causes of action in the ERISA

context").[5] Thus, the availability of relief to MAMSI turns on the proper characterization of MAMSI's action, as lying in law or in equity.

---

5. In asserting that the Reimbursement Award was erroneously made, the Sereboffs contend that the district court lacked "jurisdiction" to enter judgment in favor of MAMSI. Certain of the courts to have assessed the question presented by the Reimbursement Award have characterized the issue as whether they (the courts) possessed subject matter jurisdiction over the fiduciary's reimbursement action. *See infra* Part III.A.2 (citing *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir.2004); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348 (5th Cir.2003); *Admin. Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir.2003)). We do not, however, view the Sereboffs' appeal of the Reimbursement Award as calling federal court jurisdiction into question. Section 1331 of Title 28 provides the federal courts with jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." A case arises under the laws of the United States within § 1331 only if it is apparent from the face of a well-pleaded complaint that the plaintiff's cause of action was created by federal law, "unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, 234 U.S. 74, 75-76, 34 S.Ct. 724, 58 L.Ed. 1218 (1914). In this dispute, MAMSI's complaint seeks "equitable relief," and § 502(a)(3) of ERISA authorizes an action for "other appropriate equitable relief." As a result, the face of MAMSI's complaint reveals that its cause of action—for equitable relief under ERISA—was created by federal law. *See Westaff (USA) Inc. v. Arce*, 298 F.3d 1164, 1167 (9th Cir.2002) (concluding that when an ERISA plan fiduciary "brings a suit seeking non-equitable relief, dismissal is properly on the merits for failure to state a claim, rather than for lack of subject matter jurisdiction").

Appendix A

In assessing whether MAMSI's civil action seeks equitable or legal relief, we are guided (as was the district court) by the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002). In *Knudson*, the Court explained that § 502(a)(3) does not authorize all types of relief that a court of equity might award; it only authorizes those remedies "'that were *typically* available in equity.'" 534 U.S. at 210, 122 S.Ct. 708 (quoting *Mertens*, 508 U.S. at 256, 113 S.Ct. 2063). In that dispute, Janette Knudson, an ERISA plan beneficiary, was injured in an automobile accident; she was advanced money by the plan to cover her medical expenses; and she then recovered for her injuries in a lawsuit against the tortfeasor. *Id.* at 207, 122 S.Ct. 708. The settlement funds received from the tortfeasor did not enter into Knudson's possession, however, but instead were placed in a Special Needs Trust to provide for her ongoing medical care. *Id.* at 207-08, 122 S.Ct. 708. The plan fiduciary then sought declaratory and injunctive relief to require Knudson and her husband, the plan participant, to reimburse the plan from the litigation proceeds she had received. *Id.* at 208, 122 S.Ct. 708.

The Court denied the relief sought by the fiduciary, concluding that it was not claiming "particular funds that, in good conscience, belong to [it]," *Knudson*, 534 U.S. at 214, 122 S.Ct. 708, but instead was seeking "to impose personal liability on [the Knudsons] for a contractual obligation to pay money—relief that was not typically available in equity," *id.* at 210, 122 S.Ct. 708. The Court explained that an ERISA plan fiduciary may seek equitable restitution in the form of an equitable lien where "money or property identified as belonging in good conscience to the [fiduciary] could clearly be traced to particular

funds or property in the [beneficiary's] possession." *Id.* at 213, 122 S.Ct. 708. By contrast, the Court reasoned that where the property sought to be recovered has been" 'dissipated so that no product remains,' the [fiduciary's] 'claim is only that of a general creditor.' " *Id.* (quoting Restatement of Restitution § 215 cmt. a, at 867 (1936)). In that circumstance, the fiduciary is seeking a legal remedy—the "imposition of personal liability" on the beneficiary to pay a sum of money owed to the plan— and its action falls outside the jurisdictional ambit of § 502(a)(3). *Id.* at 214, 122 S.Ct. 708.

1.

We agree with the district court that, in this dispute, MAMSI's action seeks equitable restitution, as that term is used in *Knudson,* because MAMSI seeks to recover funds that are specifically identifiable, belong in good conscience to MAMSI, and are within the possession and control of the Sereboffs. First, the funds have not been dissipated, and they are specifically identifiable. By the stipulation of August 11, 2003, between the Sereboffs and MAMSI, $74,869.37 of the settlement funds are preserved by the Sereboffs in their investment accounts. Although the funds have been placed in accounts with the Sereboffs' other monies, they can "clearly be traced to particular funds" recovered in the California litigation. *Knudson,* 534 U.S. at 213, 122 S.Ct. 708. Second, the disputed funds belong in good conscience to MAMSI. The Plan contains express, unambiguous reimbursement provisions, according MAMSI the "right to recover any payments" made to the Sereboffs by a third party. Third, the disputed funds are within the possession and control of the Sereboffs. They received those funds in the California litigation and held them in their investment accounts pending resolution of

this proceeding. In *Knudson,* by contrast, the funds received from the tortfeasor were placed in a Special Needs Trust, outside the possession or control of the beneficiary. Thus, the action pursued by MAMSI, and resulting in the Reimbursement Award, is equitable in nature under § 502(a)(3), and the court properly granted relief with respect to it.

2.

Recent decisions by the Fifth, Seventh, and Tenth Circuits support our determination that MAMSI's reimbursement proceeding lies in equity. Most recently, the Tenth Circuit, in *Administrative Committee of the Wal-Mart Associates Health & Welfare Plan v. Willard,* 393 F.3d 1119, 1122 (10th Cir.2004), concluded that a plan fiduciary may maintain an action for equitable relief if the plan is seeking to recover funds that are specifically identifiable, belong in good conscience to the fiduciary, and are within the possession and control of the beneficiary. In *Willard,* an ERISA fiduciary sought to enforce a subrogation clause against a beneficiary through imposition of a constructive trust on settlement funds received from a third party tortfeasor. *Id.* at 1120. The district court allowed the fiduciary to intervene and deposit a portion of the settlement proceeds equivalent to the medical expenses into the court registry. *Id.* at 1120-21. On appeal, the Tenth Circuit agreed that the fiduciary's effort to secure imposition of an equitable lien fell within the ambit of § 502(a)(3). *See id.* at 1125.[6]

---

6. The Sereboffs correctly note that the intervention by the fiduciary in *Willard*—to deposit a portion of the settlement proceeds into the court registry—differs from the factual predicate underlying this dispute. Here, seven months elapsed between settlement of the

(Cont'd)

Appendix A

The Fifth and Seventh Circuits followed a similar approach for assessing whether an ERISA plan fiduciary may maintain an action for equitable relief. *See Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348 (5th Cir.2003); *Admin. Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir.2003). In both *Bombardier* and *Varco*, as in this proceeding, the beneficiaries' attorneys had accepted payment from the tortfeasors on behalf of their clients, and placed the funds into accounts over which the beneficiaries had constructive possession. In those proceedings, the courts held that the fiduciaries were seeking "equitable relief" under § 502(a)(3). Here, the elements of equitable restitution are satisfied, and the district court properly awarded reimbursement to MAMSI.[7]

(Cont'd)
California litigation and MAMSI's initiation of this proceeding seeking restitution of the funds held by the Sereboffs in their investment accounts. Regardless of any time lapse, however, as in *Willard*, the funds sought by the fiduciary were clearly traceable to particular funds in the possession of the beneficiaries.

7. We recognize that our ruling today appears to be at variance with recent decisions by the Sixth and Ninth Circuits. *See Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir.2004); *Westaff (USA) Inc. v. Arce*, 298 F.3d 1164 (9th Cir.2002). In those decisions, the courts held that a plan fiduciary's assertion of a subrogation right to reimbursement from a plan beneficiary who has received payments from a third party is legal in nature, regardless of whether the beneficiary possesses that recovery in an identifiable fund. *See Qualchoice*, 367 F.3d at 650; *Westaff*, 298 F.3d at 1167. In *Westaff*, the Ninth Circuit acknowledged that the funds at issue—
(Cont'd)

Appendix A

B.

After making its Reimbursement Award to MAMSI, the district court reduced the Award to account for MAMSI's prorated share of the Sereboffs' attorney's fees and costs associated with the California litigation (the Deduction Ruling). MAMSI contends that the Deduction Ruling was erroneous, asserting that such a deduction is not appropriate where the plan is compelled to retain counsel to protect its reimbursement interests, and when the beneficiary fails to abide by the plan's provisions.

A primary purpose of ERISA is to "ensure the integrity of written, bargained-for benefit plans." *United McGill Corp. v. Stinnett,* 154 F.3d 168, 172 (4th Cir.1998). To achieve this objective, the "plain language of an ERISA plan must be enforced

---

(Cont'd)

which were placed in an escrow account in the beneficiary's name pending a determination of their ownership—were "specifically identifiable." 298 F.3d at 1167. Nevertheless, the court held that the funds were a "legitimate personal injury settlement to which the beneficiary is entitled" and that the fiduciary's action was "one for money damages" falling outside the jurisdictional grant of § 502(a)(3). *Id.* Similarly, in *Qualchoice,* the Sixth Circuit concluded that a plan fiduciary's action for reimbursement was legal in nature, even though the beneficiary possessed the funds recovered from a third party in an identifiable fund. 367 F.3d at 649. We perceive, as did the Tenth Circuit in *Willard* and the Fifth Circuit in *Bombardier,* that the *Qualchoice* and *Westaff* decisions depart from the Court's decision in *Knudson,* and we decline to follow their more restrictive view of what constitutes "other appropriate equitable relief" under § 502(a)(3). *See Willard,* 393 F.3d at 1125; *Bombardier,* 354 F.3d at 358 n. 43.

in accordance with 'its literal and natural meaning.'" *Id.* (quoting *Health Cost Controls v. Isbell,* 139 F.3d 1070, 1072 (6th Cir.1997)). In this dispute, the provisions of the Plan mandate that any reimbursement to MAMSI of payments made to the Sereboffs by a third party is subject to a deduction for "reasonable attorney fees and court costs prorated to reflect that portion of the total recovery which is due [MAMSI] for benefits paid." Plan at 29.

Under the terms of the Plan, a prorated portion of the Sereboffs' attorney's fees and costs associated with the California litigation should be deducted from the Reimbursement Award. The Reimbursement Award grants reimbursement to MAMSI in the sum of $74,869.37, which represents the amount being held in the Sereboffs' investment accounts that the Plan paid for their medical expenses. As that sum is roughly ten percent of the $750,000 settlement agreement, the district court appropriately reduced the Reimbursement Award by that proportion of the Sereboffs' litigation expenses.

In contending otherwise, MAMSI relies on court decisions that did not involve agreements regarding the deduction of attorney's fees from reimbursement awards. *See Waller v. Hormel Foods Corp.,* 120 F.3d 138 (8th Cir.1997); *United States v. Tobias,* 935 F.2d 666 (4th Cir.1991). In fact, each of those decisions suggests that the inclusion of such a provision in the ERISA plan would have altered the ruling. *See Waller,* 120 F.3d at 141 (basing amount of deduction on value of plan beneficiary's legal service to plan because "the Plan's subrogation clause contains no provision regarding attorney's fees"); *Tobias,* 935 F.2d at 669 (observing that general rule against "common fund" reimbursement has exception for "express or implied

agreements" regarding attorney's fees). In these circumstances, we must affirm the Deduction Ruling.

C.

Finally, the Sereboffs challenge the Attorney's Fee Ruling made by the district court, in which MAMSI was awarded the attorney's fees and costs it had incurred in litigating the Reimbursement Award. Because ERISA authorizes a district court to exercise its discretion to award a "'reasonable attorney's fee and costs of action to either party,'" we review the Attorney's Fee Ruling for abuse of discretion. *Johannssen v. Dist. No. 1—Pac. Coast Dist.*, 292 F.3d 159, 178 (4th Cir.2002) (quoting 29 U.S.C. § 1132(g)(1)). In reviewing such discretionary rulings, we have adhered to the proposition that discretion has been abused if a court has failed adequately to consider "judicially recognized factors constraining its exercise" of discretion, or in relying on "erroneous factual or legal premises." *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir.1993). Because this principle was contravened, we are constrained to vacate and remand on the Attorney's Fee Ruling.

In making its Attorney's Fee Ruling, the district court was obliged, pursuant to our decision in *Johannssen*, to consider each of five factors:

> (1) the degree of the opposing party's culpability or bad faith;
>
> (2) the ability of the opposing party to satisfy an award of attorney's fees;

(3) whether an award of attorney's fees against the opposing party would deter other persons acting under similar circumstances;

(4) whether the party requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and

(5) the relative merits of the parties' positions.

See Johannssen, 292 F.3d at 179. As we observed in *Johannssen*, it is essential, in "order to ensure an adequate basis for review," for the trial court to have addressed each factor. *Id.*

In making the Attorney's Fee Ruling, the district court addressed three of the five factors specified by *Johannssen*—the first, second, and fifth.[8] First, the court found that the Sereboffs (and Stein) had not acted in bad faith under the first *Johannssen* factor. This finding on the first factor was, of course, supportive of the Sereboffs' position in opposition to MAMSI's fee request. Next, the court concluded that, despite the Sereboffs' lack of bad faith, their position on the Reimbursement Award "swam against a heavy current of legal precedent," rendering their position under the fifth factor to be meritless. Although the court did not identify or explain the "heavy current" of precedent that the Sereboffs' position contravened, it was apparently referring to the decisions on which its Reimbursement Award had relied: *Knudson*, *Bombardier*, *Varco*, and our unpublished decision in

8. Although the court, in making its Attorney's Fee Ruling, observed that the second, fourth, and fifth of the *Johannssen* factors favor an award of fees, its ruling did not analyze the fourth factor.

Primax Recoveries, Inc. v. Young, 83 Fed.Appx. 523 (4th Cir.2003). In assessing the fifth *Johannssen* factor, however, the court failed to consider that the Ninth Circuit's decision in *Westaff* had created a circuit split on the question presented by the Reimbursement Award (a question that was not addressed by *Knudson*'s holding): whether a plan fiduciary asserting a subrogation right to reimbursement from a plan beneficiary who has received payments from a third party, and who possesses that recovery in an identifiable fund, is seeking "equitable relief" under § 502(a)(3) of ERISA.

Finally, the district court addressed the second *Johannssen* factor and determined that the Sereboffs would have sufficient funds available to satisfy an attorney's fee award to MAMSI. In so ruling, the court presumed that the Sereboffs' lawyer, Mr. Stein, would "credit the award [of attorney's fees and costs] against his contingent fee collected" in the underlying personal injury suit. It identified no record support, however, for the proposition that Stein would so act. In any event, the court concluded that the Sereboffs would be able to satisfy the Attorney's Fee Ruling from the $750,000 they recovered in the California litigation.

In sum, the district court's assessment of the *Johannssen* factors was incomplete. On one hand, the court's analysis of the second factor favored a fee award to MAMSI. On the other, its analysis of the first factor mitigated against any award at all, and the court did not assess either the third or the fourth factor. Finally, the court's examination of the fifth factor failed to recognize the existing circuit split on the issue raised by the Reimbursement Award. As a result, the court erred in making the Attorney's Fee Ruling, and we are constrained to vacate the Ruling and remand for a further assessment under *Johannssen*.

Appendix A

IV.

Pursuant to the foregoing, we affirm the Reimbursement Award and the Deduction Ruling, and we vacate and remand on the Attorney's Fee Ruling.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED MAY 10, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. AMD 03-2269

MID ATLANTIC MEDICAL SERVICES, INC.,

Plaintiff

v.

JOEL SEREBOFF AND MARLENE SEREBOFF,

Defendants

MEMORANDUM OPINION

DAVIS, District Judge.

In my Memorandum Opinion in this case filed on January 26, 2004, familiarity with which is assumed, *see Mid Atlantic Medical Services, Inc. v. Sereboff*, 303 F.Supp.2d 691 (D.Md.2004), I concluded that plaintiff, an ERISA-covered health insurance plan, was entitled to recover from defendants, participants in the plan, out of the proceeds of payments to defendants based on tort claims defendants asserted against those responsible for their injuries, reimbursement for health care benefits provided to them in consequence of a motor vehicle accident. The parties filed cross-appeals from my order.

Thereafter, in accordance with my order, plaintiff filed a timely application for attorney's fees and costs. *Cf. Johannssen v. District No. 1-Pacific Coast District, MEBA Pension Plan,* 292 F.3d 159, 178-79 (4th Cir.2002) (elucidating standards for attorney's fees awards under ERISA). Defendants oppose the plaintiff's application for fees and costs. No hearing is needed.

Defendants' opposition is quite narrow. They do not dispute the reasonableness of the claimed fees and expenses. Rather, recognizing the broad discretion which informs a court's determination of an application for attorney's fees under ERISA, *id.*, they urge me to exercise my discretion to deny the application. I have considered the relevant Fourth Circuit guidelines, and I am persuaded that an award of fees is warranted here.* While defendants have certainly not acted in bad faith, and indeed, have apparently followed their attorney's advice in their insistence on litigating plaintiff's entitlement to reimbursement, as my prior order shows, I am convinced that defendant's counsel unwisely swam against a heavy current of legal precedent and that part of

* The non-exclusive factors are the following: "(1) degree of opposing parties' culpability or bad faith; (2) ability of opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions." *See Johannssen,* 292 F.3d at 179. In this case, an additional factor favoring an award of fees is the fact that my prior order required the plaintiff health plan to pay (in accordance with the terms of the plan) a *pro rata* share of the litigation costs in respect to the sums recovered by defendants here in the underlying tort action. *See* 303 F.Supp.2d at 696.

the cost of doing so justifiably includes a shifting of plaintiff's modest fees. Defendants are bound by their attorney's acts in this regard. (Indeed, I am willing to presume that, under the circumstances, counsel will credit the award made here against his contingent fee collected in respect to the underlying tort case, although the award here would be made even if that were not true. This would be especially appropriate inasmuch as counsel apparently regularly represents tort plaintiffs and the issue of reimbursement arises in his practice on a regular basis. If the Fourth Circuit agrees with counsel's interpretation of the law rather than with mine, then obviously the award of fees will not stand.). Clearly, in any event, defendants' substantial tort recovery will permit them to pay the fees and costs. In sum, I find that three of the guideline factors (factors (2), (4) and (5)) favor an award of fees, and two of them (factors (2) and (5)) decidedly so. Accordingly, the application for attorney's fees and costs shall be granted.

Filed: May 10, 2004

/s/
ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE

Appendix B

ORDER

In accordance with the foregoing Memorandum Opinion, it is this 10th day of May, 2004, by the United States District Court for the District of Maryland, ORDERED

(1) That the plaintiff's motion for attorney's fees, expenses and prejudgment interest is GRANTED; and it is further ORDERED

(2) That JUDGMENT IS HEREBY ENTERED IN FAVOR OF PLAINTIFF AGAINST DEFENDANTS JOINTLY AND SEVERALLY IN THE AMOUNT OF NINETEEN THOUSAND, FORTY-FOUR DOLLARS AND 75/100 ($19,044.75) TOGETHER WITH INTEREST AT THE LEGAL RATE OF SIX PERCENT PER ANNUM DATING FROM MARCH 13, 2004, THROUGH THE DATE OF THIS JUDGMENT; and it is further ORDERED

(3) That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed.R.Civ.P. 58.

/s/
ANDRE M. DAVIS
United States District Judge

APPENDIX C — OPINION AND DECLARATORY JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DECIDED JANUARY 26, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. AMD 03-2269

January 26, 2004, Decided

MID ATLANTIC MEDICAL SERVICES INC.,

Plaintiff

v.

JOEL SEREBOFF and MARLENE SEREBOFF,

Defendants

MEMORANDUM OPINION

DAVIS, District Judge.

Defendants Joel and Marlene Sereboff, residents of Maryland, were injured in a motor vehicle accident while visiting California. In consequence of their injuries, the ERISA-covered health insurance plan of which they were participants through Mrs. Sereboff's employer provided benefits in the amount of $74,869.37. In due course, the Sereboffs successfully prosecuted a civil action in California state court against the parties responsible for their injuries. Ultimately, they settled their claims

for $750,000. Thereafter, upon the refusal by the Sereboffs to pay over a portion of their recovery to the health insurance plan in reimbursement for the benefits that had been provided, plaintiff Mid Atlantic Medical Services, Inc., the plan fiduciary, instituted this action against them pursuant to § 502(a)(3) the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(3).* Now pending are (1) the motion to dismiss for failure to state a claim filed by defendants and (2) the motion for summary judgment filed by plaintiff. The issues have been fully briefed and no hearing is necessary. For the reasons stated below, the motion to dismiss shall be denied and the motion for summary judgment shall be granted in part and denied in part.

I.

The applicable standard for the review of a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6) is well settled:

> A Rule 12(b)(6) motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true, it appears certain that the plaintiff cannot prove any set of facts in support

---

* Plaintiff's verified complaint joined the Sereboffs' California attorney and his law firm (who were named in a separate count for interference with contractual relations) as well as the Sereboffs themselves (and indeed, plaintiff sought a temporary restraining order) because there was uncertainty as to how the settlement proceeds might be handled and the timing of any disbursements. Defendants other than the Sereboffs have been dismissed and the sole claim pending at this time is plaintiff's claim for reimbursement under ERISA.

> of his claim entitling him to relief. *See Edwards v. City of Goldsboro,* 178 F.3d 231, 244 (4th Cir.1999). Furthermore, the "Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Rather, Rule 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2).

Migdal v. Rowe Price-Fleming Int'l, Inc., 248 F.3d 321, 325-26 (4th Cir.2001).

Pursuant to Fed.R.Civ.P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material for purposes of summary judgment, if when applied to the substantive law, it affects the outcome of the litigation. *Id.* at 248, 106 S.Ct. 2505. Summary judgment is also appropriate when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A party opposing a properly supported motion for summary judgment bears the burden of establishing the existence of a genuine issue of material fact. *Anderson,* 477 U.S. at 248-49, 106 S.Ct. 2505. "When a motion for summary judgment is made

and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in [Rule 56] must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). *See Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. 2548; *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505; *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir.1991). Of course, the facts, as well as the justifiable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. *See Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The court, however, has an affirmative obligation to prevent factually unsupported claims and defenses from proceeding to trial. *See Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir.1987).

II.

Helpfully, the parties have entered into a comprehensive stipulation of undisputed facts which, without the exhibits thereto, is attached to this Memorandum Opinion and is incorporated by reference herein.

At bottom, the dispute between the parties is narrow and highly focused, and may be set forth succinctly. In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213-14, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), the Supreme Court affirmed a judgment of the Ninth Circuit that an ERISA fiduciary could not recover reimbursement in federal court against a beneficiary (who, like the Sereboffs, had suffered injuries in a motor vehicle accident) under ERISA § 502(a)(3) because the

relief the fiduciary sought was not "other appropriate equitable relief" within the contemplation of § 502(a)(3). The Court held on the facts presented that the ostensible claim for "restitution" sought by the ERISA fiduciary was actually a claim for compensatory damages relief. *See id.* at 213, 122 S.Ct. 708 ("[N]ot all relief falling under the rubric of restitution is available in equity.").

In announcing its holding, *Knudson* provided some critical *obiter dicta* in delineating the circumstances under which an ERISA fiduciary's claim falls on the "equity" or "law" side of the often fuzzy line separating the two forms of monetary relief encompassed by the term restitution:

> In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity. See, *e.g.*, 1 Dobbs §§ 1.2, at 11; *id.*, §§ 4.1(1), at 556; *id.*, §§ 4.1(3), at 564-565; *id.*, §§§§ 4.2-4.3, at 570-624; 5 Corbin §§ 1102, at 550; Muir, ERISA Remedies: Chimera or Congressional Compromise?, 81 Iowa L.Rev. 1, 36-37 (1995); Redish, Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making, 70 Nw. U.L.Rev. 486, 528 (1975). Thus, "restitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case," and whether it is legal or equitable depends on "the basis for [the plaintiff's] claim" and the nature of the underlying remedies sought. *Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (C.A.7 1994) (Posner, J.).

Appendix C

In cases in which the plaintiff "could *not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him," the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit. 1 Dobbs §§ 4.2(1), at 571. See also Muir, *supra,* at 37. In such cases, the plaintiff's claim was considered legal because he sought "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." Restatement of Restitution §§ 160, Comment *a,* pp. 641-642 (1936). Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied).

In contrast, a plaintiff could seek restitution *in equity,* ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. See 1 Dobbs §§ 4.3(1), at 587-588; Restatement of Restitution, *supra,* §§ 160, Comment *a,* at 641-642; 1 G. Palmer, Law of Restitution §§ 1.4, p. 17; §§ 3.7, p. 262 (1978). A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where "the property [sought to be recovered] or its proceeds

> have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant]." Restatement of Restitution, *supra*, §§ 215, Comment *a*, at 867. Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Id. at 213-15.

Virtually every federal court that has been called upon to apply the Supreme Court's decision in *Knudson* has recognized the import of the Court's *dicta* and has held that where funds in the actual or constructive possession of a plan beneficiary are traceable to "money or property identified as belonging in good conscience to [the ERISA plan]," *id.* at 214, 122 S.Ct. 708, the ERISA fiduciary may bring its claim for reimbursement in federal court under § 502(a)(3), as a claim for "other appropriate equitable relief." *See, e.g., Primax Recoveries, Inc. v. Young*, 83 Fed.Appx. 523, 2003 WL 22973630 (4th Cir.2003) (citing with approval *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 445 (5th Cir.2002)); *Bombardier Aerospace Employee Welfare Benefits Plan*, 354 F.3d 348, 356 (5th Cir.2003) (formulating the following three-part test for cognizable actions under § 503(a)(3): "Does the Plan seek to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the Plan, and (3) that are within the possession and control of the defendant beneficiary?"). Against the weight of authority on these issues, it appears, as the Sereboffs note, the Ninth Circuit

seems to have ignored the Supreme Court's *dicta,* as it continues to declare, even after *Knudson,* and seemingly without qualification, that reimbursement claims by ERISA fiduciaries are legal claims for compensatory damages seeking to impose personal liability. *See Westaff (USA) v. Arce,* 298 F.3d 1164, 1167 (9th Cir.2002) (reasoning that even though funds recovered by the insured are in the insured's possession (escrow account) and identifiable, an action to determine the rights of the insurer under the plan's subrogation clause is a request for legal relief and not authorized by § 502(a)(3)), *cert. denied,* 537 U.S. 1111, 123 S.Ct. 901, 154 L.Ed.2d 784 (2003). The Sereboffs invite me to apply the Ninth Circuit's approach in this case, either because it is a sounder approach as a matter of policy or because the accident out of which plaintiff's claim arises occurred in that circuit. I decline this invitation and adhere to the approach followed by the courts that have given precedential effect to the Supreme Court's *dicta* in *Knudson.*

Manifestly, in the case at bar, plaintiff (an ERISA fiduciary) seeks to recover funds that (1) are "specifically identifiable" (because they were paid to the Sereboffs and their attorney on behalf of the tortfeasors causing their injuries, and the specific portion claimed by plaintiff has been separated from the balance of those funds); (2) "belong in good conscience to the Plan" (because the plain language of the plan indisputably requires reimbursement under the circumstances of the Sereboffs' tort claims arising out of the California accident); and (3) "are within the possession and control of the defendant beneficiary" (because the Sereboffs and their attorney received the funds in hand and the Sereboffs have segregated the claimed monies in an investment account to abide the result of this lawsuit). Accordingly, defendants' motion to dismiss shall be denied because the verified

complaint adequately puts defendants on notice of the nature and character of plaintiff's claim and indeed, plainly states a claim under ERISA as elucidated in *Knudson*. Furthermore, defendants having failed to generate a genuine dispute of material fact as to any element of plaintiff's claim, and because plaintiff is entitled to judgment as a matter of law, plaintiff's motion for summary judgment shall be granted, but only in part.

Plaintiff's motion for summary judgment shall be granted only *in part* because I am constrained to reject plaintiff's attempt to avoid a *deduction* from its claimed amount for reimbursement to account for its *pro rata* share of (the Sereboffs') attorney's fees and costs that were incurred to achieve success in prosecuting their state court damages action. It is undisputed that such a deduction is provided for under the plain terms of the plan. Plaintiff contends that because the Sereboffs (admittedly on the advice of their California counsel, who understandably is enamored of the Ninth Circuit approach to reimbursement claims by ERISA fiduciaries), have disputed plaintiff's entitlement to reimbursement, required that plaintiff file this case. This is scant reason to ignore the plain terms of the plan and I decline to do so. On the other hand, ERISA provides that a "'court in its discretion may allow a reasonable attorney's fee and costs of action to either party.' 29 U.S.C. §§ 1132(g)(1)." *Johannssen v. District No. 1-Pacific Coast District, MEBA Pension Plan,* 292 F.3d 159, 168-69 (4th Cir.2002). Thus, plaintiff is free to file an application for attorney's fees pursuant to ERISA in accordance with Local Rule 109.2. *See also* Fed. R. Civ. P. 54(d)(2)(A), (B).

Appendix C

III.

For the reasons set forth, the motion to dismiss shall be denied and the motion for summary judgment shall be granted in part and denied in part. An order follows. If plaintiff files a motion for attorney's fees as the prevailing party in this action, briefing on such motion shall proceed in the normal course.

Appendix C

DECLARATORY JUDGMENT and ORDER

In accordance with the foregoing Memorandum Opinion, it is this 26th day of January, 2004, by the United States District Court for the District of Maryland, ORDERED, ADJUDGED, and DECREED

(1) That the defendants' motion to dismiss is DENIED; and it is further ORDERED

(2) That the plaintiff's motion for summary judgment is GRANTED IN PART AND DENIED IN PART; and it is further ORDERED

(3) That ON OR BEFORE FEBRUARY 9, 2004, DEFENDANTS JOEL SEREBOFF and MARLENE SEREBOFF SHALL PAY OVER TO PLAINTIFF OR ITS DESIGNEE THE PRINCIPAL SUM OF $74,869.37, TOGETHER WITH INTEREST AT THE LEGAL RATE OF SIX PERCENT PER ANNUM DATING FROM MARCH 12, 2003, PROVIDED THAT SUCH PAYMENT SHALL BE REDUCED BY THE AMOUNT CALCULATED PURSUANT TO PARAGRAPH (4) BELOW; and it is further ORDERED

(4) That IN ACCORDANCE WITH THE TERMS OF THE MAMSI LIFE AND HEALTH INSURANCE PPO, THE AMOUNT PAYABLE BY DEFENDANTS TO PLAINTIFF SHALL BE REDUCED BY PLAINTIFF'S *PRO RATA* SHARE OF "REASONABLE ATTORNEY FEES AND COURT COSTS," THE TOTAL AMOUNT OF WHICH THE COURT FINDS AS A MATTER OF LAW TO BE

Appendix C

(a) $26,123.15 (COSTS AND LITIGATION EXPENSES) and

(b) A REASONABLE ATTORNEY FEE OF TWENTY-FIVE PERCENT (25%) OF THE TOTAL RECOVERY ($750,000) PAID TO AND ON BEHALF OF JOEL SEREBOFF and MARLENE SEREBOFF IN RESPECT OF THEIR INJURIES AND LOSSES IN THE UNDERLYING STATE COURT CLAIM; and it is further ORDERED

(5) That THIS ORDER IS ENTERED WITHOUT PREJUDICE TO PLAINTIFF'S RIGHT TO SEEK AN AWARD OF ATTORNEY'S FEES AND COSTS AS PREVAILING PARTY IN THIS ACTION; and it is further ORDERED

(6) Any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed.R.Civ.P. 58.

/s/
ANDRE M. DAVIS
United States District Judge

Appendix C

ATTACHMENT TO COURT'S OPINION

JOINT STIPULATION OF FACTS

1. Mid Atlantic Medical Services, Inc. ("MAMSI") is a fiduciary of the MAMSI Life and Health Insurance PPO Plan (the "Plan"), which is sponsored by Katzen Eye Group.

2. Defendant, Dr. Joel Sereboff, is a licensed psychologist residing in Owings Mills, Maryland and has been a practicing psychologist for 30 years.

3. Defendant, Marlene Sereboff, resides in Owings Mills, Maryland and is a registered nurse. She has worked at Katzen Eye Group for 20 years as a nurse and has been married to Dr. Joel Sereboff for 30 years.

4. On June 22, 2000, Joel and Marlene Sereboff were visiting California and were in the process of returning a vehicle to the Hertz-Rent-A-Car lot at San Jose International Airport when they were struck by a vehicle driven by Mr. Roederer, an employee of Lancaster Colony Corporation, in the course and scope of his employment.

5. The minor collision between the two vehicles caused the Sereboff's vehicle to be pushed into a K-Rail (a New Jersey turnpike barrier) with an exposed blunt concrete end. The design of this rental car facility greatly aggravated Sereboffs' injuries.

6. The owner of the property, City of San Jose, entered into a lease with a consortium of rental car companies who represented the entire spectrum of the rental car industry in

America. The consortium retained an architect to design the rental facility. All of these defendants were joined in the litigation. The initial Complaint was filed on August 11, 2000 and was amended to include the City of San Jose, the architect, the builders, and the rental car consortium.

7. After the events of the September 11, 2001 attack, a number of these rental car companies (Budget, National, Alamo) went into bankruptcy and the litigation was stayed on three occasions to exclude them from further participation in the litigation, but allowing the Sereboffs to go forward against the remaining defendants.

8. Joel Sereboff and Marlene Sereboff, for all times relevant to this action, were members of the Plan for the purposes of obtaining medical, surgical and hospital benefits.

9. The Plan is covered by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et. seq.* The Plan is a self-funded employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1).

10. In connection with the injuries suffered by Defendant Marlene Sereboff, the Plan paid medical benefits on her behalf in the amount of $73,778.26. In connection with the injuries suffered by Defendant Joel Sereboff, the Plan paid medical benefits on his behalf in the amount of $1,091.11.

Appendix C

11. The Plan contains an acts of third parties provision, which states:

ACTS OF THIRD PARTIES

This subrogation provision applies when you are sick or injured as a result of the act or omission of another person or party. Subrogation means the Company's right to recover any payments made to you or your dependent by a third party or any insurer acting in place of, or on behalf of a third party or a third party's insurer, because of an injury or illness caused by a third party. Third party means another person or organization.

If you or your dependent receives benefits and have a right to recover damages from a third party, the Company is subrogated to this right. All recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the Company net of reasonable attorney fees and court costs prorated to reflect that portion of the total recovery which is due the Company for benefits paid. Any remainder will be yours or your dependents. The Company's share of the recovery will not be reduced because you or your dependent has not received the full damages claimed, unless the Company agrees in writing to a reduction.

You must promptly advise the Company whenever a claim is made against a third party with respect to any loss for which the Company benefits have been

> or will be paid. You or your dependent must execute any assignments, liens or other documents and provide information as the Company requests. MLH's benefits may be withheld until documents or information are received. If you need more information about subrogation, the Company will provide you with its subrogation procedures.

A true and correct copy of the Plan provision is attached hereto as Exhibit 1.

12. On August 11, 2000, John Stein ("Stein"), the Sereboff's attorney, filed a personal injury action in the Santa Clara County Superior Court on behalf of the Sereboffs in an action styled *Joel Sereboff and Marlene Sereboff v. Lancaster Colony Corporation, a corporation, Budget Rent-A-Car Corporation, a corporation, Team Fleet Financing Corporation, a corporation, Charles E. Roederer and Does 1 to 50,* case number CV791810. A true and correct copy of the referenced complaint is attached hereto as Exhibit 2.

13. In a separate correspondence dated October 18, 2000, from MAMSI to Stein, one letter regarding Marlene Sereboff and the other letter regarding Joel Sereboff, MAMSI informed Stein that it had reimbursement interest in proceeds the Sereboffs may recover relating to their injuries pursuant to the Evidence of Coverage and offered Stein an opportunity to assert MAMSI's subrogation lien. A true and correct copy of the October 18, 2000, correspondence is attached hereto as collective Exhibit 3.

Appendix C

14. In correspondence dated October 18, 2000, from MAMSI to Marlene Sereboff, MAMSI informed her that it had paid $67,670.65 in medical claims on behalf of her and that, pursuant to the Evidence of Coverage, MAMSI has a right to reimbursement and, as such, requested that she sign an agreement acknowledging that she will abide by the terms within the Evidence of Coverage. Marlene Sereboff did not sign and return the agreement to MAMSI. A true and correct copy of the October 18, 2000, correspondence is attached hereto as Exhibit 4.

15. In correspondence dated October 18, 2000, from MAMSI to Marlene Sereboff regarding Joel Sereboff, MAMSI informed her that it had paid $5,797.60 in medical claims on behalf of Joel and that, pursuant to the Evidence of Coverage, MAMSI has reimbursement rights and, as such, requested that he sign an agreement acknowledging that she will abide by the terms within the Evidence of Coverage. (Marlene Sereboff did not sign and return the agreement to MAMSI). A true and correct copy of the October 18, 2000, correspondence is attached hereto as Exhibit 5.

16. In correspondence dated December 6, 2000, from MAMSI to Stein, MAMSI again gave Stein notice of its subrogation lien for medical expenses paid on behalf of Marlene Sereboff and again offered Stein an opportunity to assert MAMSI's subrogation lien. A true and correct copy of the December 6, 2000, correspondence is attached hereto as Exhibit 6.

17. In correspondence dated December 6, 2000, from MAMSI to Stein, MAMSI gave Stein notice that its subrogation lien had increased to $70,180.46. A true and correct copy of

the December 6, 2000, correspondence is attached hereto as Exhibit 7.

18. In correspondence dated December 6, 2000, from MAMSI to Marlene Sereboff, MAMSI informed her that she must reimburse the Plan upon recovery in relation to her injuries and requested that she sign an agreement acknowledging her obligation to reimburse MAMSI. A true and correct copy of the December 6, 2000, correspondence is attached hereto as Exhibit 8.

19. In correspondence dated December 6, 2000, sent via facsimile from MAMSI to Stein, MAMSI requested that Stein sign a lien agreement. Stein did not sign and return the lien agreement to MAMSI. A true and correct copy of the December 6, 2000, correspondence is attached hereto as Exhibit 9.

20. In correspondence dated April 13, 2001, from MAMSI to Stein regarding Marlene Sereboff, MAMSI informed Stein that the current amount of its lien was $72,317.35. A true and correct copy of the April 13, 2001, correspondence is attached hereto as Exhibit 10.

21. In separate correspondence dated April 13, 2001, from MAMSI to Stein and Marlene Sereboff, MAMSI made a formal demand requesting that Marlene Sereboff cooperate with MAMSI to enforce its rights under the Evidence of Coverage and sign a lien acknowledgement form. A true and correct copy of the April 13, 2001, correspondence is attached hereto as Exhibit 11.

Appendix C

22. In correspondence dated April 24, 2001, from Stein to MAMSI, Stein informed MAMSI that he did not believe that it was entitled to reimbursement, citing four Ninth Circuit Court opinions holding that subrogation liens are not collectable. A true and correct copy of the April 24, 2001, correspondence is attached hereto as Exhibit 12.

23. In correspondence dated May 7,2001, from MAMSI to Stein, MAMSI gave notice of its reimbursement right and subrogation lien for medical claims paid on behalf of Joel Sereboff and offered Stein an opportunity to assert MAMSI's subrogation lien. A true and correct copy of the May 7, 2001, correspondence is attached hereto as Exhibit 13.

24. In correspondence dated May 7, 2001, from MAMSI to Stein, MAMSI requested that Stein complete and return an accident information form. A true and correct copy of the May 7, 2001, correspondence is attached hereto as Exhibit 14.

25. In correspondence dated May 7, 2001 from MAMSI to Marlene Sereboff, MAMSI informed her that she must reimburse MAMSI upon recovery from the parties responsible for Joel Sereboff's injuries and again requested that she sign and return an agreement acknowledging her obligation to reimburse MAMSI. A true and correct copy of the May 7, 2001, correspondence is attached hereto as Exhibit 15.

26. In correspondence dated May 23, 2001, MAMSI responded to Stein's April 24, 2001, correspondence. MAMSI denied it was an ERISA Plan and reasserted MAMSI's request for a signed lien agreement. MAMSI asserted that the Health Plan was a Maryland contract and that California law did not

apply. A true and correct copy of the May 23, 2001, correspondence is attached hereto as Exhibit 16.

27. In correspondence dated May 30, 2001, from Stein to MAMSI, Stein advised MAMSI to retain a California attorney to protect MAMSI's reimbursement interest in the litigation pending in California because he did not believe he could represent both interests. Stein told MAMSI they should negotiate separately for reimbursement of all monies owned MAMSI. A true and correct copy of the May 30, 2001, correspondence is attached hereto as Exhibit 17.

28. In correspondence dated June 7, 2001, from Stein to MAMSI, Stein enclosed a copy of the state court complaint he filed on behalf of the Sereboffs. A true and correct copy of the June 7, 2001, correspondence is attached hereto as Exhibit 18.

29. In correspondence dated June 28, 2001 from Stein to MAMSI, Stein informed MAMSI that his position regarding its reimbursement and lien claims against proceeds recovered by Joel Sereboff was the same as his position with regard to MAMSI's reimbursement and lien claims against proceeds recovered by Marlene Sereboff. A true and correct copy of the June 28, 2001, correspondence is attached hereto as Exhibit 19.

30. In correspondence dated October 17, 2001, and December 17, 2001, from MAMSI to Stein, MAMSI informed Stein that its lien was $72,929.86 for the medical claims paid on behalf of Marlene Sereboff and requested that Stein remit a check to MAMSI in the amount of the lien at the time the Sereboffs settled their pending personal injury action. A true and correct

copy of the October 17, 2001, and December 17, 2001, correspondence is attached hereto as collective Exhibit 20.

31. In correspondence dated February 22, 2002, from MAMSI to Stein regarding Joel Sereboff, MAMSI informed Stein that the current subrogation lien amount was $1,091.11. A true and correct copy of the February 22, 2002, correspondence is attached hereto as Exhibit 21.

32. In correspondence dated April 25, 2002, June 25, 2002, August 22, 2002, and March 12, 2003, from MAMSI to Stein regarding Marlene Sereboff, MAMSI informed Stein that its subrogation lien was $73,778.26 and requested that Stein reimburse MAMSI in the amount of the lien at the time of settlement. A true and correct copy of the April 25, 2002, June 25, 2002, August 22, 2002, and March 12, 2003, correspondence is attached hereto as collective Exhibit 22.

33. In correspondence dated May 24, 2002, August 22, 2002, and March 12, 2003, from MAMSI to Stein regarding Joel Sereboff, MAMSI informed Stein that the amount of its lien was $1,091.11 and requested that Stein make a check payable to MAMSI in the amount of the lien upon the case settling. A true and correct copy of the May 24, 2002, August 22, 2002, and March 12, 2003, correspondence is attached hereto as collective Exhibit 23.

34. On January 23, 2003, the case settled as to all parties in favor of the Sereboffs' claims. All defendants paid $750,000. Notice to the Court is attached hereto as Exhibit 27.

Appendix C

35. In correspondence dated March 12, 2003, from MAMSI to Joel Sereboff, MAMSI informed Joel Sereboff that the amount of MAMSI's lien was $1,091.11 and requested that he issue a check to MAMSI in the amount of its lien upon the case settling. A true and correct copy of the March 12, 2003, correspondence is attached hereto as Exhibit 24.

36. In correspondence dated March 12, 2003, from MAMSI to Marlene Sereboff, MAMSI informed her that the amount of MAMSI's lien was $73,778.26 and requested that she issue a check to MAMSI in the amount of its lien upon the case settling. A true and correct copy of the March 12, 2003, correspondence is attached hereto as Exhibit 25.

37. The Sereboffs did not reimburse MAMSI in the amount of its lien following their settlement or notify MAMSI of their settlement.

38. In correspondence dated March 20, 2003, from Stein to MAMSI, replying to MAMSI's March 12, 2003 correspondence, Stein reiterated his opinion that the liens were not collectable, citing *Great-West Life & Annuity Insurance Company v. Janette Knudson* and *Westaff (USA) Inc. v. Betty Arce*. A true and correct copy of the March 20, 2003, correspondence is attached hereto as Exhibit 26.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC* FILED JUNE 1, 2005

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 04-1336
CA-03-2269-AMD-1

MID ATLANTIC MEDICAL SERVICES, LLC

Plaintiff - Appellee

v.

JOEL SEREBOFF; MARLENE SEREBOFF

Defendants - Appellants

No. 04-1403
CA-03-2269-AMD-1

SECRETARY OF LABOR

Amicus Supporting Appellee

MID ATLANTIC MEDICAL SERVICES, LLC

Plaintiff - Appellant

v.

JOEL SEREBOFF; MARLENE SEREBOFF

Defendants - Appellees

Appendix D

No. 04-1722
CA-03-2269-AMD-1

MID ATLANTIC MEDICAL SERVICES, LLC

Plaintiff - Appellee

v.

JOEL SEREBOFF; MARLENE SEREBOFF

Defendants - Appellants

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Widener, Judge King, and Judge Floyd.

For the Court,

/s/ Patricia S. Connor
CLERK

OCT 27 2005

No. 05-260

IN THE

Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,
Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS F. FITZGERALD
WILLIAM F. HANRAHAN
GROOM LAW GROUP, CHARTERED
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 857-0620

GREGORY S. COLEMAN
Counsel of Record
CHRISTOPHER S. JOHNS
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 1350
Austin, Texas 78759
(512) 349-1930

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

CORPORATE DISCLOSURE STATEMENT

Mid Atlantic Medical Services, Inc., the named plaintiff in this case, merged into Mid Atlantic Medical Services, LLC (formerly MU Acquisition LLC) upon acquisition by United-Health Group Incorporated on February 10, 2004, with Mid Atlantic Medical Services, LLC as the survivor.

Mid Atlantic Medical Services, LLC is owned 100% by UnitedHealth Group Incorporated, a publicly held company.

TABLE OF CONTENTS

	PAGE
Corporate Disclosure Statement	i
Table of Authorities	iv
Statement of the Case	1
Statement of Facts	3
Reasons to Deny the Petition	5
I. The Court Should Deny the Petition Because the Circuit Split May Resolve Itself	6
A. Most Courts of Appeals Agree About How to Resolve the Question Presented in This Case	8
B. The Conflict May Resolve Itself Without the Court's Intervention	10
II. The Fourth Circuit Properly Interpreted §502(a)(3) and Thereby Protected Important Federal Interests	13
Conclusion	17

TABLE OF AUTHORITIES

Cases **Page**

Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan v. *Willard*, 393 F.3d 1119 (CA10 2004) 6, 8, 9, 10
Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. *Varco*, 338 F.3d 680 (CA7 2003), *cert. denied*, 124 S.Ct. 2904 (2004) 6
Barnes v. *Alexander*, 232 U.S. 117 (1914) 13
Bombardier Aerospace Employee Welfare Benefits Plan v. *Ferrer*, 354 F.3d 348 (CA5 2003), *cert. denied*, 541 U.S. 1072 (2004) 6, 8, 9, 10
Carpenters Health & Welfare Trust for S. Cal. v. *Vonderharr*, 384 F.3d 667 (CA9 2004), *petition for cert. filed*, 73 U.S.L.W. 3466 (U.S. Jan. 31, 2005) (No. 04-1049) 10, 11
Eldridge v. *Wachovia Corp. Long-Term Disability Plan*, 383 F.Supp.2d 1367 (N.D. Ga. 2005) 6, 8, 10
Great-West Life & Annuity Inc. v. *Knudson*, 534 U.S. 204 (2002) ..... *passim*
Memphis & L.R.R. Co. v. *Dow*, 120 U.S. 287 (1887) 14
Mertens v. *Hewitt Assocs.*, 508 U.S. 248 (1993) 7, 15
Mid Atl. Med. Servs., LLC v. *Sereboff*, 407 F.3d 212 (CA4 2005), *petition for cert. filed*, 74 U.S.L.W. 3130 (U.S. Aug. 25, 2005) (No. 05-260) ..... *passim*

TABLE OF AUTHORITIES—CONTINUED

	Page
N. Am. Coal Corp. v. *Roth*, 395 F.3d 916 (CA8 2005), *cert. denied*, __ U.S. __, 2005 WL 1452399 (U.S. Oct. 3, 2005) (No. 04-10618)	10
Pearlman v. *Reliance Ins. Co.*, 371 U.S. 132 (1962)	14
Providence Health Plan v. *McDowell*, 385 F.3d 1168 (CA9 2004)	11
Qualchoice, Inc. v. *Rowland*, 367 F.3d 638 (CA6 2004), *cert. denied*, 125 S.Ct. 1639 (2005)	*passim*
Scholastic Corp. v. *Najah Kassem & Casper & De Toledo LLC*, No. 3:04-CV-1752, 2005 WL 2276042 (D. Conn. Sept. 19, 2005)	*passim*
Space Gateway Support v. *Prieth*, 371 F.Supp.2d 1364 (M.D. Fla. 2005)	6, 8, 10
Watkins v. *Westinghouse Hanford Co.*, 12 F.3d 1517 (CA9 1993)	11
Westaff (USA) Inc. v. *Arce*, 298 F.3d 1164 (CA9 2002)	4, 11
Wylie v. *Coxe*, 56 U.S. 415 (1854)	13
Statutes	
29 U.S.C. §1132(a)(3)	4, 7, 13
Other	
S. 4, 109th Cong. §162 (2005)	12
3 DAN B. DOBBS, LAW OF REMEDIES §12.20(3) (2d ed. 1993)	15
4 GEORGE E. PALMER, LAW OF RESTITUTION §23.18(d) (1978)	14

TABLE OF AUTHORITIES—CONTINUED

Page

ROBERT GOFF & GARETH JONES, THE LAW OF RESTITUTION §3-004 (Gareth Jones ed., 6th ed. 2002) 15

Brief for the United States as Amicus Curiae, *Carpenters Health & Welfare Trust for S. Cal.* v. *Vonderharr*, No. 04-1049 (U.S. Oct. 21, 2005) 9, 13, 16

IN THE

Supreme Court of the United States

No. 05-260

JOEL SEREBOFF and MARLENE SEREBOFF,
Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Mid Atlantic Medical Services, LLC respectfully suggests that the Court may reasonably deny the petition. The conflict among the circuits is not as deep as petitioners suggest, and it may eventually resolve itself.

STATEMENT OF THE CASE

The narrow question presented in this case is whether the fiduciary of an employer-sponsored health plan may obtain an equitable lien or constructive trust under ERISA §502(a)(3) on specifically identifiable proceeds from a settlement between a plan participant and a third-party tortfeasor when the terms of the plan expressly provide that third-party recoveries must be used to reimburse the plan for medical expenses it paid on the participant's behalf. There is no need for the Court to review the decision in this case because the Fourth

Circuit's decision properly interprets §502(a)(3) and gives effect to the purposes of ERISA both in adequately protecting insureds and in controlling health care costs for employers.

Three years ago in *Great-West Life & Annuity Inc.* v. *Knudson*, 534 U.S. 204 (2002), the Court suggested that a plan fiduciary could bring suit under §502(a)(3) if the basis for the claim and the remedy sought were "typically available in equity." The Court noted that a party traditionally could state a valid claim for equitable restitution if the disputed funds are specifically identifiable, belong in good conscience to the plan, and are within the possession and control of the defendant. See *Great-West*, 534 U.S., at 213.

Most courts to subsequently address the issue, including the Fourth Circuit in this case, have correctly recognized that a plan fiduciary's reimbursement action comfortably fits within the narrow confines of traditional equity recognized in *Great-West* when the disputed funds are specifically identifiable and within the defendant's possession and control. Consistent with *Great-West*'s instructions, the approach of the Fourth, Fifth, Seventh, and Tenth Circuits properly considers whether the basis of the claim is equitable in nature *and* whether the relief sought is an equitable remedy. In this case, the basis of the fiduciary's claims—equitable restitution to enforce subrogation or reimbursement rights with respect to specific property in the defendant's possession that belongs in good conscience to the claimant—was typically available in equity and existed (whether or not there was a contractual relationship between the parties) in order to prevent unjust enrichment. Likewise, the remedies sought by the plan fiduciary—a constructive trust or an equitable lien—were quintessential equitable responses. Only two circuits, the Sixth and the Ninth, have erroneously held to the contrary, essentially holding that an ERISA-based claim for reimbursement will never be an equitable claim.

Petitioners are correct in noting that the circuits are split on this issue, but the Court may reasonably consider denying certiorari in this case because the circuit split is relatively new and may eventually resolve itself.

STATEMENT OF FACTS

The Sereboffs, who live in Maryland, were beneficiaries under a self-funded health plan sponsored and maintained by the Katzen Eye Group, Marlene Sereboff's employer. Mid Atlantic serves as fiduciary of the plan. On June 22, 2000, the Sereboffs were visiting California and were in the process of returning a vehicle to a rental-car facility at San Jose International Airport when another vehicle struck them. The plan paid the Sereboffs' medical expenses, which totaled $74,869.37.

The plan contains an "ACTS OF THIRD PARTIES" subrogation provision that gives the plan the "right to recover any payments" made to beneficiaries by third parties for injuries caused by the acts of "another person or party." Pet. App. 38a-39a. When the plan pays out benefits, "*[a]ll recoveries* from a third party (whether by lawsuit, settlement, or otherwise) *must be used to reimburse the Company* . . . to reflect that portion of the total recovery which is due the Company for benefits paid." *Id.*, at 38a (emphasis added). The subrogation provision also obligates beneficiaries to "promptly advise [Mid Atlantic] whenever a claim is made against a third party" and obligates them to execute any assignments or liens that the plan requests. *Id.*, at 38a-39a.

The Sereboffs initiated a state-court action in California in August 2001 against the joint tortfeasors. In late 2000 and early 2001, the plan reminded the Sereboffs and their lawyer that the plan was entitled to reimbursement should the California litigation be successful, and it asked the Sereboffs to execute subrogation-lien agreements acknowledging their obligations under the plan. *Id.*, at 39a-45a. The Sereboffs

initially ignored the plan's requests and ultimately refused to execute the proposed agreements. The plan paid additional benefits throughout 2001 and 2002, and it repeatedly sent updates to the Sereboffs and their lawyer about the current value of the plan's anticipated subrogation liens. *Ibid.* In January 2003, the California litigation settled, and the defendants paid the Sereboffs $750,000. The Sereboffs never discharged the amount of the plan's asserted liens. Instead, the Sereboffs' lawyer disbursed the funds to the Sereboffs and to his law firm. The Sereboffs then placed the funds into their investment accounts. After a March 2003 letter from the plan that again informed the Sereboffs of the amount of its liens and requested reimbursement upon settlement, the Sereboffs' lawyer responded that the liens were not collectable, citing *Great-West* and *Westaff (USA) Inc.* v. *Arce*, 298 F.3d 1164 (CA9 2002). Pet. App. 45a.

In August 2003, Mid Atlantic instituted this action in the District of Maryland under §502(a)(3) of ERISA, which authorizes ERISA participants or fiduciaries to enjoin any act violating the terms of an ERISA plan or to "obtain other appropriate equitable relief" to enforce a plan's provisions. 29 U.S.C. §1132(a)(3). Mid Atlantic asserted the plan's subrogation rights and requested, among other forms of relief, restitution of and a constructive trust over the disputed funds held by the Sereboffs in their investment accounts. Mid Atlantic also sought emergency relief to prevent dissipation of the disputed funds, and the Sereboffs agreed to "preserve $74,869.37 of the settlement funds" until the dispute is resolved. Pet. App. 6a.

Mid Atlantic moved for summary judgment, asserting that the claim to "recover the disputed proceeds" sought appropriate "equitable relief" under §502(a)(3) of ERISA. Pet. App. 6a. The Sereboffs responded that Mid Atlantic's claim sought monetary damages that are not permissible under ERISA. *Ibid.* The district court granted in part Mid

Atlantic's summary-judgment motion, holding that Mid Atlantic's claim was cognizable under §502(a)(3) and that the plan was entitled to reimbursement of $74,869.37, plus interest. Pet. App. 6a. The district court reduced the reimbursement award to account for the plan's prorated share of the reasonable attorneys' fees and court costs from the California litigation. *Id.*, at 7a.

The Fourth Circuit affirmed, agreeing that the basis of Mid Atlantic's claim and the remedy sought were equitable in nature. The court of appeals explained that Mid Atlantic's action was for equitable restitution because the disputed funds "have not been dissipated," "are specifically identifiable," "belong in good conscience" to the plan, and "are within the possession and control of the Sereboffs." Pet. App. 11a, *Mid Atl. Med. Servs., LLC* v. *Sereboff*, 407 F.3d 212, 218-219 (CA4 2005), *petition for cert. filed*, 74 U.S.L.W. 3130 (U.S. Aug. 25, 2005) (No. 05-260). The court of appeals noted that "[r]ecent decisions by the Fifth, Seventh, and Tenth Circuits support our determination" that Mid Atlantic's claim lies in equity. Pet. App. 12a. The court of appeals also recognized that its ruling "appears to be at variance with recent decisions by the Sixth and Ninth Circuits." *Id.*, at 13a n.7. The Sereboffs' petition for panel rehearing and rehearing en banc was denied.

REASONS TO DENY THE PETITION

Petitioners correctly assert a conflict among the courts of appeals on the question presented. The Sixth and Ninth Circuits interpret §502(a)(3) of ERISA as categorically barring a plan fiduciary's subrogation and reimbursement rights under a plan agreement. *Qualchoice, Inc.* v. *Rowland*, 367 F.3d 638 (CA6 2004), *cert. denied*, 125 S.Ct. 1639 (2005); *Westaff*, 298 F.3d, at 1164. The Fourth, Fifth, Seventh, and Tenth Circuits allow equitable subrogation under §502(a)(3) when the disputed funds are specifically identifiable, belong in good conscience to the plan, and are within the possession and